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No. 1
No. 2
No. 3

Supreme Court of the United States.

October Term, 1924.

Nos. 165 166 167

Steamship "WILLDOMINO", Her Engines, Boilers, Etc.,
Petitioner (Respondent Below),

against

CITRO CHEMICAL COMPANY OF AMERICA,
Respondent (Libelant Below).

Steamship "WILLDOMINO", Her Engines, Boilers, Etc.,
Petitioner (Respondent Below),

against

CHARLES PFIZER & COMPANY, Inc.,
Respondent (Libelant Below).

CONVOY STEAMSHIP COMPANY, Ltd., Owner of the Steamship "WILLDOMINO", Her Engines, Boilers, Etc.,
Petitioner (Libelant Below),

against

CHARLES PFIZER & COMPANY, Inc.,
Respondent (Respondent Below).

Petition for Writs of Certiorari and Brief.

FRANCIS RAWLE,
GEORGE W. BETTS, Jr.,
GEORGE C. SPRAGUE,
JOSEPH W. HENDERSON,
Counsel for Petitioners.

[illegible], 30 Church St., [illegible]

Supreme Court of the United States.

STEAMSHIP WILLDOMINO, HER ENGINES, BOILERS, ETC.,
Petitioner (Respondent Below),
against
CITRO CHEMICAL COMPANY OF AMERICA,
Respondent (Libelant Below).

October Term, 1924.
No.

STEAMSHIP WILLDOMINO, HER ENGINES, BOILERS, ETC.,
Petitioner (Respondent Below),
against
CHARLES PFIZER & COMPANY, INC.,
Respondent (Libelant Below).

October Term, 1924.
No.

CONVOY STEAMSHIP COMPANY, LTD., Owner of the Steamship Willdomino, Her Engines, Boilers, Etc.,
Petitioner (Libelant Below),
against
CHARLES PFIZER & COMPANY, INC.,
Respondent (Respondent Below).

October Term, 1924.
No.

NOTICE OF PETITION FOR WRITS OF CERTIORARI.

SIRS:

Please take notice that the annexed petition for writs of certiorari to the United States Circuit Court of Appeals for the Third Circuit will be submitted to the

Supreme Court of the United States on the opening of court on the sixth day of October, 1924, or so soon thereafter as counsel may be heard.

Dated, Philadelphia, September 3, 1924.

FRANCIS RAWLE,
GEORGE W. BETTS, JR.,
GEORGE C. SPRAGUE,
JOSEPH W. HENDERSON,
Counsel for Petitioners.

To

MESSRS. BIGHAM, ENGLAR & JONES,
and
MESSRS. MCDERMOTT, ENRIGHT & CARPENTER,
Proctors for Respondent.

IN THE SUPREME COURT OF THE UNITED STATES.

Steamship Willdomino, Her Engines, Boilers, Etc.,
Petitioner (Respondent Below),
against
Citro Chemical Company of America,
Respondent (Libelant Below).
October Term, 1924.
No.

Steamship Willdomino, Her Engines, Boilers, Etc.
Petitioner (Respondent Below),
against
Charles Pfizer & Company, Inc.,
Respondent (Libelant Below).
October Term, 1924.
No.

Convoy Steamship Company, Ltd., Owner of the Steamship Willdomino, Her Engines, Boilers, Etc.,
Petitioner (Libelant Below),
against
Charles Pfizer & Company, Inc.,
Respondent (Respondent Below).
October Term, 1924.
No.

PETITION FOR WRITS OF CERTIORARI TO REVIEW THE DECISIONS OF THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorables the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitions of Convoy Steamship Company, Ltd., and the SS. "Willdomino" respectfully show unto this Court as follows:

1. These are petitions for writs of certiorari to the United States Circuit Court of Appeals for the Third Circuit on the ground that the questions involved are of paramount importance to carriers of goods by water involving the construction of the Harter Act (27 Stat. 445) on a point which has never been raised before this Court, in the decision of which the said Circuit Court of Appeals for the Third Circuit has misconstrued said statute contrary to the regularly accepted canons of statutory construction and to the decisions of the Circuit Court of Appeals for other circuits.

2. The libels filed in these cases by the Citro Chemical Company of America and by Charles Pfizer & Company, Incorporated, are shippers' actions against the vessel for damages to cargo caused by the stranding of the SS. "Willdomino" on a submerged object off the coast of Nova Scotia about seven miles from Gannet Rock. The vessel was claimed by the Convoy Steamship Company, Limited, as owner. The action of the Convoy Steamship Company, Limited, is to recover freight money from Charles Pfizer & Company, Incorporated, for carriage of part of the cargo. The damages claimed by the Citro Chemical Company of America are $67,500 and Charles Pfizer & Company, Incorporated, $179,000. The freight money claimed by the Convoy Steamship Company, Limited, is $2514.08.

3. These three cases were ordered tried together by Judge Lynch in the United States District Court for the District of New Jersey in admiralty, and were printed in one record and argued together as one appeal and briefed as one appeal before the Third Circuit; and in order to save the time of your Honorable Court and for convenience will be argued together as

one petition for writs of certiorari and are briefed as one brief.

4. Judge Lynch decided the cases in favor of the petitioners by dismissing the libels in the cases brought by the Citro Chemical Company of America and Charles Pfizer & Company, Incorporated, against the SS. "Willdomino" and in favor of the petitioner, Convoy Steamship Company, Limited, against Charles Pfizer & Company, Incorporated, for freight money in the sum of $2965.01.

5. On appeal the decisions were reversed in an opinion by Judge Morris, District Judge for the District of Delaware, sitting specially in the Circuit Court of Appeals for the Third Circuit, with whom Woolley and Davis, Circuit Judges, concurred. A motion for rehearing was made and denied.

Statement of Facts.

6. The respondent, Citro Chemical Company of America, was the owner and consignee of one hundred and sixty-eight (168) casks of citrate of lime shipped on board the SS. "Willdomino" in June, 1920, at Messina, Italy, for New York; the respondent Charles Pfizer & Company, Incorporated, was the owner and consignee of three hundred and thirty-five (335) casks of citrate of lime likewise shipped. Bills of lading were issued by the ship's agent acknowledging receipt on board the vessel of the aforesaid merchandise in apparent good order and condition, to be carried to New York upon the following conditions, among others:

> "with liberty to call at *intermediate ports* * or any port or ports in or out of the customary route in any order to receive and discharge coal, cargo, passengers and for any other purposes . . .

*All italics are petitioners.

"*It is Mutually Agreed as Follows:* First: The Ship and Carrier shall not be liable for loss or damage occasioned by the perils of the sea or other waters . . . *or unseaworthiness of the ship even existing at time of shipment or sailing on the voyage, provided the owners have exercised due diligence to make the vessel seaworthy,* by collision, stranding or other accidents of navigation of whatsoever kind, even when occasioned by the negligence, default or error in judgment of the pilot, master, mariners or other servants of the ship-owner . . .; nor for any loss or damage occasioned by causes beyond his control . . .

"Third: The value of package receipted for as above does not exceed the sum of $100 unless otherwise stated herein, on which basis the rate of freight is adjusted.

"Eighth: *The ship has liberty of filling up and/or bunkering at any port or ports in or out of the way.*

"Ninth: Full freight is due on damaged goods and on goods diminished by leaking, but no freight is due on any increase in bulk or weight caused by the absorption of water during the voyage.

"Filling up only in ports on the way westward of (sic) New York." (This last clause is in handwriting; all clauses italicized above in heavy black type on the bill of lading.)

7. The two shipments in question constituted only a small part of the total cargo carried by the "Willdomino." After loading this merchandise and other cargo, the vessel sailed from Messina on June 11 and arrived at Gibraltar on June 16 and while at Gibraltar the master received from her owners the following cablegram:

"Your coal requirements excessive cost of bunkers Gibraltar very high make accurate measurement remaining bunkers if not enough to make North Sydney take only enough to reach there cut down consumption in every way if fuel runs short reaching coast cut out one boiler."

The SS. "Willdomino" received on board 400 tons of bunker coal at Gibraltar. This amount of coal added to what she had, made 756 tons of bunker coal on board when she sailed from Gibraltar on June 17. From Gibraltar the vessel proceeded to Lisbon, arriving at that port on June 18 and took on board additional cargo. She left Lisbon on June 24.

8. On June 29 a breakdown of the high-pressure turbine occurred, causing the loss of a large amount of lubricating oil and making it necessary for the vessel to proceed on her low-pressure turbine only, resulting in reduction of speed and increased coal consumption. This made additional coal and oil necessary and the vessel entered Ponta Delgada, Azores, therefor on July 3d. Both courts below held that this breakdown of machinery "was not attributable to any lack of care or diligence." After obtaining minor repairs and stores, including 250 tons of bunker coal, the vessel left Ponta Delgada on July 10 with 629 tons of coal in her bunkers.

9. While still a day out from North Sydney the vessel received a wireless from her owners to go to Halifax instead of North Sydney. At this time, however, the vessel did not have sufficient coal on board to reach Halifax, so she put in at North Sydney, where she arrived safely on July 21 with 62 tons of coal in her bunkers. She was able to procure at North Sydney only 62½ tons of coal, as there was a strike at that time, and she then was sent to Halifax, and while proceeding from North Sydney to Halifax about 6.30 A. M. on July 24 during a fog, she struck a reef or submerged object and tore a large hole in her bow. Water entered and almost completely filled lower No. 1 hold in which the citrate of lime was stored. The master was an experienced navigator who had twenty-

three years' experience and held a master's certificate for twelve years. He had never been over the course from Sydney to Halifax though he had been from Lewisburg to Halifax and from St. Johns to Halifax. The currents along the coast off which his course lay are treacherous. The coast is very tortuous and rugged and is recognized as a dangerous one. The master obtained a bearing at 5.45 P. M. from Scutari Lighthouse. At 8 P. M. she ran into a thick fog which continued throughout the night until after the stranding. After entering the fog speed was reduced and the whistle blown. The master was proceeding by dead reckoning and believed that his vessel was on her course twenty miles off shore. At 4.30 A. M. on the morning of July 24 he took a sounding which sounding showed ninety-one fathoms and no more soundings were made. Two hours later the vessel stranded about seven miles off shore. (The District Court found that the stranding occurred without fault; the Circuit Court of Appeals held that the stranding was negligent because of the failure of the master to take additional soundings.) After much difficulty, due to the propellers being partly out of water owing to the sea water in No. 1 hold, and after some assistance by a Government tug, the vessel reached Halifax on July 28.

10. At Halifax the vessel was surveyed by the port warden and by representatives of Lloyds and the London Salvage Association, and under their joint recommendation 400 tons of sand ballast were placed on the after deck, certain cargo shifted aft to correct her trim and the bulkhead between the submerged hold (No. 1) and the adjoining hold (No. 2) were strengthened. No cargo was discharged at Halifax. No drydock could be obtained at Halifax.

11. The vessel thereupon proceeded to New York under her own power but in convoy of a tug. She arrived at New York on August 7th. The larger part of her cargo, consisting of lemons, was discharged at Jersey City between August 7 and 19, after which the vessel was moved to One Hundred and Thirty-fourth Street, North River, Manhattan, and her cork cargo discharged, part of which was above the submerged citrate of lime in lower No. 1 hold.

After discharging the cork, the vessel went into dry dock in Hoboken on August 25 for survey. The contract for repairs was executed the following day and the repair work proceeded expeditiously. On October 2 the repairs were completed and the damaged merchandise was then removed from the hold and tendered to the respondents who refused to accept the same and abandoned the merchandise to the vessel.

12. Neither the petitioners nor their officers knew, nor were they at any time informed by the respondents of the characteristics of citrate of lime and that said merchandise was of high value. The respondent Citro Chemical Company of America knew of the stranding before the vessel arrived at New York and the respondent Charles Pfizer & Company, Incorporated, learned of it shortly thereafter. Both respondents were familiar with the characteristics of citrate of lime and its value, made surveys of this merchandise, including chemical tests of samples taken at the time the vessel first went into dry dock and stated that this merchandise was a total loss.

Citrate of lime consists of chalk as a carrier for citric acid, the citric acid having high value and the chalk very little value. The immersion of citrate of lime in sea water causes no chemical change in the commodity but does result in a bacteriological growth which exists for a time and frees a small amount of the citric acid content. The residue remaining after

the bacteriological growth ceases is still citrate of lime but contains slightly less citric acid content than before immersion. The citric acid content of the merchandise in question when shipped was 64 per cent.; tests of respondent's chemist from samples of the wet citrate taken when the vessel was first in drydock showed a citric acid content of from 26 per cent. to 42 per cent., without taking into account the fact that there was a large percentage of water in the sample. Allowing for the water in the sample tested, respondent's chemist stated that the citric acid content in the damaged merchandise was substantially 60 per cent. This was a loss of about 7 per cent. in that portion of the commodity which was valuable.

Decisions Below.

Judge Lynch in the District Court found that (1) the vessel was seaworthy upon leaving Messina; (2) that she was justified in going into Sydney under the deviation clause contained in the bill of lading; (3) that the stranding occurred at a time when competent mariners were exercising due care and diligence, and that such stranding was the "proximate cause of the damage inflicted on the citrate of lime by sea water"; (4) that the petitioner exercised reasonable care of the damaged merchandise after the stranding; and as there was no negligence on the part of the steamship dismissed the libels for cargo damage and sustained the cross-libel for freight.

The Circuit Court of Appeals found that (1) the stranding was due to negligent navigation in that the master failed to take sufficient soundings, (2) the ship and carrier were not entitled to the protection of the bill of lading provisions exempting it and them from liability for negligent stranding, inasmuch as these provisions were ineffective so far as they went beyond Section 3 of the Harter Act, and immaterial so far as

they gave the same relief as Section 3 of said act, (3) the "Willdomino" was unseaworthy upon sailing from Lisbon and Ponta Delgada because it had insufficient coal to reach New York but that this unseaworthiness did not contribute to the cargo damage, said damage being due to negligent navigation and not to unseaworthiness, (4) the ship and carrier were not entitled to the protection of Section 3 of the Harter Act because the vessel was unseaworthy for lack of sufficient bunkers upon sailing from Lisbon and Ponta Delgada and petitioner did not use due dilgence to make her seaworthy in this respect, (5) the vessel went to Sydney, C. B., for bunkers for an ensuing voyage rather than for bunkers to complete her trip to New York and that this was a deviation depriving the vessel and the petitioner of the protection of the agreed valuation clause in the bill of lading, (6) petitioner failed to exercise the reasonable care of the damaged merchandise required of them under the circumstances in not having discharged the citrate of lime as soon as the vessel was first drydocked for survey, (7) the cargo was not in specie when tendered to respondent Charles Pfizer & Company, Incorporated, and said respondent was not liable for the freight due on said shipment.

The Questions Involved.

I. Must there not be causal connection between the lack of due diligence to make a vessel seaworthy in all respects (lack of bunkers), properly manned, equipped and supplied, and the cause of the damage (negligence in navigation) to deprive the vessel and her owners of the exemption from liability afforded in Section 3 of the Harter Act (27 Stat. 445)? The Circuit Court of Appeals in its opinion states: "It follows, we think, that if the carrier fails to meet that burden (*proof that he exercised due diligence to make the vessel seaworthy in all respects, properly manned, equip-*

ped and supplied),* he is liable for damage to the cargo resulting from negligence of the Master and crew in the navigation or management of the vessel and the carrier is so liable, wholly without regard to whether or not there was any causal connection between the lack of due diligence to make the ship seaworthy in all respects and the loss caused by the negligence in navigation or the management of the vessel."

It is respectfully submitted that the interpretation placed by the Court below on Section 3 of the Harter Act finds no support in the authorities, but on the contrary, we submit that the clause "in all respects" used in Section 3 of the act means in all respects material to, or connected in causation with the errors in navigation or management. In these cases the Circuit Court of Appeals found the vessel unseaworthy by having insufficient bunkers when she left Lisbon and Ponta Delgada. The Circuit Court of Appeals further found that the cause of the damage was stranding, which was brought about by negligence in navigation and that the unseaworthiness had nothing to do with the stranding.

II. Under the terms of the bills of lading reading:

> "with liberty to call at *intermediate ports* or any port or ports in or out of the customary route in any order to receive and discharge coal, cargo, passengers and for any other purposes . . .
>
> "Eighth: *The ship has liberty of filling up and/or bunkering at any port or ports in or out of the way.*"

was the act of the SS. "Willdomino" in going to Sydney a deviation? The Circuit Court of Appeals drew

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*(Inserted by petitioner.)

an inference contrary to the only direct testimony on this point, that the vessel went to Sydney, C. B., for bunkers for a subsequent voyage and not for bunkers for the remainder of her voyage to New York and that such act constituted a deviation. The vessel actually took sixty-two and one-half tons of coal at Sydney. We submit that the Circuit Court of Appeals has missed the point.

III. Was not citrate of lime in specie, which contained approximately 60 per cent. citric acid content, in damaged condition when it only contained 64 per cent. citric acid content in sound condition, the citric acid content being the only valuable part of the commodity?

Reasons For Granting the Writs.

For the reasons assigned, we respectfully submit, that this Court should exercise its power to take up these cases on *certiorari* and set aside the findings made by the Circuit Court of Appeals on the ground that those findings involve the Circuit Court of Appeals in serious errors of law.

A. The Court erred in holding that there need be no causal connection between the lack of due diligence required by Section 3 of the Harter Act to make the vessel seaworthy in all respects, properly manned and equipped and the negligence in navigation or management causing the damage in order to deprive the owner of the exemption from liability given by said section.

B. That the ruling appears contrary to the principles applied in *The Turret Crown* (284 Fed. 439, 444, in the Circuit Court of Appeals for the Fourth Circuit).

C. The Court erred in holding that a steamer making a voyage by stages must commence each stage with a fuel supply adequate and proper for that stage and that the failure to exercise proper diligence in this regard at the commencement of any stage deprives the owner of the exemptions of Section 3 of the Harter Act, whether the cargo loss resulting from negligent navigation occurs during that stage or not.

It is of great commercial importance to the public, shippers, underwriters and steamship owners to have definitely determined whether there must be causal connection between the cause of the damage and the lack of due diligence required in Section 3 of the Harter Act in order to deprive the owner of the steamship of the exemptions provided in that section. This point has never been passed upon by this Court nor even discussed by it. There is an apparent conflict of authority between the statements contained in the decisions referred to in the brief attached to this petition and the decisions in the Circuit Court of Appeals in these cases and it is of first importance to have the matter definitely determined and a uniform decision on a commercial question of such magnitude as this.

D. The Court erred in basing a finding of fact that the vessel went to Sydney for bunkers for a subsequent voyage upon a mere inference which was contrary to the only direct evidence in these cases upon this point.

E. The Court erred in finding that the question of deviation was a question of intention and the fact that the "Willdomino" did not obtain bunkers for a subsequent voyage at North Sydney was immaterial, which ruling is directly contrary to *Marine Insurance Company v. Tucker*, 3 Cranch 357, 393, holding that an

intention to deviate is not a deviation unless the intention be carried into execution.

F. The Court erred in holding that the citrate of lime was not in specie when tendered to the respondent Charles Pfizer & Company by the petitioners when the uncontradicted evidence shows that there had been no chemical change in the citrate of lime, that this commodity was merely citric acid absorbed by chalk, the citric acid content being the only valuable part of the commodity and that the citric acid content of the merchandise in damaged condition was approximately 60 per cent., while the citric acid content of the sound merchandise was 64 per cent.

ACCOMPANYING DOCUMENTS.

A certified copy of the transcript of record and of the proceedings of the District Court and the Circuit Court of Appeals is presented herewith.

WHEREFORE, your petitioners respectfully pray that writs of certiorari may be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Third Circuit, demanding the said Court to certify and send to this Court for its review and determination on a day certain to be therein designated, a full and complete transcript of the record of all proceedings in the said Circuit Court of Appeals in the said cases entitled in that Court: Citro Chemical Company of America, Appellant, v. Steamship "Willdomino," her engines, boilers, etc., Appellee, No. 50, October Term 1923; Charles Pfizer & Company, Inc., Appellant, v. Steamship "Willdomino," her engines, boilers, etc., Appellee, No. 51, October Term 1923; Charles Pfizer & Company, Inc., Appellant, v. Convoy Steamship Company, Ltd., owner of the Steamship "Willdomino," her en-

gines, boilers, etc., No. 52, October Term 1923; and that the said decrees of the Circuit Court of Appeals made and entered in the said cases on the fourth day of June, 1924, may be reversed by this Honorable Court and that your petitioners may have such other or further relief or remedy in the premises as to this Honorable Court may seem meet and just, and that your petitioners will ever pray, etc.

CONVOY STEAMSHIP COMPANY, LTD., on its own behalf and as claimant of the SS. "Willdomino," her boilers, engines, etc.,

By H. ROBERT BURNEY,
Treasurer.

FRANCIS RAWLE,
GEORGE W. BETTS, JR.,
GEORGE C. SPRAGUE,
JOSEPH W. HENDERSON,
Counsel for Petitioners.

STATE OF NEW YORK,
COUNTY OF NEW YORK, } *ss.:*

H. ROBERT BURNEY, being duly sworn, says:

I am the Treasurer of the Convoy Steamship Company, Ltd., which is a corporation of Nova Scotia, and on its own behalf and as claimant of the SS. "Willdomino," the petitioners herein, I make this affidavit.

I have read the foregoing petitions and have knowledge of this litigation; the matters stated in the petitions are true to the best of my knowledge, information and belief.

Sworn to before me this 29th day of August, 1924. } H. ROBERT BURNEY.

JOSEPH A. BARRETT,
Notary Public.
Westchester County,
Certificate filed in Westchester County Register's Office,
New York County Clerk's No. 559,
New York County Register's No. 5406,
Commission expires March 30, 1925.
(Seal)

We hereby certify that the foregoing petition in our opinion is well founded and entitled to the favorable consideration of the Court, and that it is not filed for the purpose of delay.

FRANCIS RAWLE,
GEORGE W. BETTS, JR.,
GEORGE C. SPRAGUE,
JOSEPH W. HENDERSON,
Counsel for Petitioners.

IN THE SUPREME COURT OF THE UNITED STATES.

Steamship Willdomino, Her Engines, Boilers, Etc.,
Petitioner (Respondent Below),
against
Citro Chemical Company of America,
Respondent (Libelant Below).
October Term, 1924.
No.

Steamship Willdomino, Her Engines, Boilers, Etc.,
Petitioner (Respondent Below),
against
Charles Pfizer & Company, Inc.,
Respondent (Libelant Below).
October Term, 1924.
No.

Conroy Steamship Company, Ltd.,
Owner of the Steamship Willdomino, Her Engines, Boilers, Etc.,
Petitioner (Libelant Below),
against
Charles Pfizer & Company, Inc.,
Respondent (Respondent Below).
October Term, 1924.
No.

BRIEF FOR THE PETITIONERS.

The facts are summarized in the petition.

POINT ONE.

THE DECISION OF THE CIRCUIT COURT OF APPEALS THAT THE PETITIONERS WERE NOT RELEIVED FROM LIABILITY UNDER SECTION 3 OF THE HARTER ACT, FOR THE CARGO DAMAGE CAUSED BY NEGLIGENT STRANDING, WAS ERRONEOUS.

The Circuit Court of Appeals found that the ship was unseaworthy, but that "the proximate cause of the

stranding of the 'Willdomino,'' from which the libellants' original loss resulted, was not unseaworthiness of the ship.'' It held that if the carrier fails to meet the burden of showing due diligence to make the vessel seaworthy ''he is liable for damage to the cargo resulting from negligence of the master and crew in the navigation or management of the vessel and the carrier is so liable wholly without regard to whether or not there was any causal connection between the lack of due diligence to make the ship seaworthy in all respects and the loss caused by the negligence in navigation or in the management of the vessel.''

Section 3 of the Harter Act (27 Stat. 445) reads as follows:

> ''SEC. 3. That if the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent, or charterers shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel nor shall the vessel, her owner or owners, charterers, agent, or master be held liable for losses arising from dangers of the sea or other navigable waters, acts of God, or public enemies, or the inherent defect, quality, or vice of the thing carried, or from insufficiency of package or seizure under legal process, or for loss resulting from any act or omission of the shipper or owner of the goods, his agent or representative, or from saving or attempting to save life or property at sea, or from any deviation in rendering such service.''

Admitting for the purpose of the argument that sailing from Lisbon and Ponta Delgada with insufficient bunkers to reach New York constituted unsea-

worthiness we contend that the Circuit Court of Appeals misconstrued the aforesaid section in its application to these cases.

Its construction of Section 3 makes no allowance for those cases in which the owner has failed to exercise due diligence to make the vessel seaworthy in some respect not connected with the negligent navigation or management, causing the cargo damage, but requires in all cases as an absolute condition precedent to exempt the owner from liability for such damage that he shall have used due diligence to make the vessel seaworthy in every respect.

If the Court has correctly interpreted Section 3, it follows that an owner who fails to exercise due diligence in inspection of any of the thousand and more parts of the ship and her equipment immediately prior to her sailing, and she sails with any one of those parts defective and the defect in no wise contributes to subsequent damage to cargo caused by negligent navigation or management, nevertheless he is deprived of the protection afforded by said section. A carrier might thus be held liable in damages where the vessel sailed with a defective refrigerating plant, defective life boat, lacking a spare anchor, having taken insufficient precautions to keep down vermin, a broken plate on the galley stove or a broken rung in the ladder, although the condition of none of said parts in any way contributed to the cargo damage which was caused solely by negligence in navigation and management.

Such an interpretation leads to injustice and absurd conclusions. It leads to injustice because it holds a carrier liable for damage which in no way resulted from his wrong. It leads to absurd conclusions because of the extent to which the doctrine could be carried and the carrier held liable for immense cargo damage caused by negligent stranding where he had

failed only in one minor particular of inspection in one of a possible thousand different items of the ship's equipment in no way connected with the stranding causing the damage.

A literal construction of the phrase "in all respects" used in Section 3 of the Harter Act might lend some weight to such an interpretation, but a study of the act in connection with well-established legal principles, and the rules of statutory construction, shows very clearly that Congress did not intend the phrase so to be construed.

It is elementary law "that if one does wrong from which no legal injury ensues, there is no legal cause of action; it is *injuria sine damno.*" *Sutherland on Damages* (4th ed.) I, section 3, page 5.

Congress did not intend any construction of the phrase "in all respect" which would lead to injustice, and absurd conclusions, as it doubtless in drafting Section 3 had in mind the well-known rule of statutory construction laid down by Mr. Justice Field in *United States v. Kirby*, 7 Wall. 482, and followed by this Court ever since.

In that case, this Court construed a statute providing for a fine of $100 against "any person" who knowingly and wilfully obstructed the United States mails, and held that the term "any person" did not apply to a sheriff who went aboard a steamer carrying the United States mails and served a warrant for murder upon the mail clerk. Mr. Justice Field there laid down the following rule (pp. 486, 487):

> "All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language, which would avoid results of this character. The reason of the law in such cases should prevail over its letter.

> "The common sense of man approves the judgment mentioned by Puffendorf, that the Bolognian law which enacted, 'that whoever drew blood in the streets should be punished with the utmost severity,' did not extend to the surgeon who opened the vein of a person that fell down in the street in a fit. The same common sense accepts the ruling, cited by Plowden, that the statute of 1st Edward II, which enacts that a prisoner who breaks prison shall be guilty of felony, does not extend to a prisoner who breaks out when the prison is on fire—'for he is not to be hanged because he would not stay to be burnt.'"

The rule was followed in *Holy Trinity Church v. United States*, 143 U. S. 457, wherein the Court interpreted the Immigration Act (23 Stat. 332), which made it unlawful for any person "to prepay the transportation . . . of any alien . . . under contract . . . to perform labor or service of any kind in the United States." The Circuit Court for the Second Circuit had held the contract between Holy Trinity Church of New York with an English minister to come to New York and act as its rector was within the prohibition of the statute. That decision was reversed by this Court. We quote from the opinion as follows (pp. 458, 459):

> "It must be conceded that the act of the corporation is within the letter of this section, for the relation of rector to his church is one of service, and implies labor on the one side with compensation on the other. Not only are the general words labor and service both used, but also, as it were to guard against any narrow interpretation and emphasize a breadth of meaning, to them is added 'of any kind'; and, further, as noticed by the Circuit Judge in his opinion, the fifth section, which makes specific exceptions, among them professional actors, artists, lecturers, singers and domestic servants, strengthens the idea that every

other kind of labor and service was intended to be reached by the first section. While there is great force to this reasoning, we cannot think Congress intended to denounce with penalties a transaction like that in the present case. *It is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers.** This has been often asserted, and the reports are full of cases illustrating its application. This is not the substitution of the will of the Judge for that of the legislator, for frequently words of a general meaning are used in a statute, words broad enough to include an act in question, and yet a consideration of the whole legislation, or of the circumstances surrounding its enactment, *or the absurd results which follow* from giving such broad meaning to the words, makes it unreasonable to believe that the legislator intended to include the particular act."

The doctrine was reaffirmed and followed by this Court in:

Lau Ow Bew v. United States, 144 U. S. 47;
Knoulton v. Moore, 178 U. S. 41, 77;
Hawaii v. Mankichi, 190 U. S. 197;
Pickett v. United States, 216 U. S. 456;
Baender v. Barnett, 255 U. S. 224.

We submit that what Congress did intend as the real purpose of Section 3 was to exempt the carrier from damage due to negligent navigation or management, and as Congress did not wish to include in negligent management the acts of preparing a vessel for the voyage and thus relieve the shipowners from liability where such acts were in themselves the active causes of the damage, it adopted the proviso that the owners should exercise due diligence to make the ves-

*All italics in this brief are ours.

sel in all respects seaworthy. If damage occurred by stranding through the owners' failure to exercise due diligence in selecting the navigating officers who took the vessel to sea or in the failure to supply such officers with proper navigating instruments, compasses, charts or sounding machines, the owner was to be responsible; but where the owner had used due diligence in the selection of the navigating officers and in supplying them with proper navigating instruments, compasses, charts, sounding machines and all other equipment required for navigation, and the stranding occurred through the failure of the officers to properly use these instruments, then the owner was not to be liable, even though the owner had failed to exercise due diligence to make the vessel seaworthy in some particular that had no bearing on the stranding.

Professor Frederick Green, in 1903, ably discussed the effect of this proviso of Section 3 in an article in 16 Harvard Law Review, 157, 167, entitled "The Harter Act":

> "Suppose, however, that there has been neither seaworthiness nor diligence to make seaworthy, yet that damage results solely from fault in navigation. A steamship has a cracked shaft that will be dangerous in rough weather, but by negligence the crack is not discovered and she is permitted to sail without repair. No rough weather occurs. The steamer crosses the ocean in safety, but negligently comes into collision in the harbor of destination. Is the owner, who would not have been made liable for damage to his cargo by the negligent failure to examine the shaft before sailing, provided it had not been cracked, to be rendered liable by the mere fact that a crack in it existed, although its existence had not the slightest connection with the damage? The proviso is whimsical, if for such an irrelevant accident it excludes the owner from an exemption he would otherwise receive.

"No case has been found in which the owner was so excluded. Although the passage last quoted from the opinion of the Supreme Court may seem at first sight to say that he should be excluded, it will appear on examination that it does not say so.* It means that if the cause of the loss is a failure to use care to make seaworthy, the case is not within the exemption, even though such failure is a fault in management. It does not mean that exemption would be refused for a fault in management, because of a failure to use care to make seaworthy, distinct from the fault in management and not contributing to the loss.

"The sole effect of the proviso seems to be that which has just been suggested. When section three says that the owner shall not be liable for fault in navigation or management, provided diligence has been used to make seaworthy, it excludes from fault in management all carelessness in preparing the vessel for the voyage. Under this interpretation, the act is reasonable and consistent, and its language is such as might naturally be used to express its intent. The interpretation is a literal one as well. For the diligence to which the proviso refers is diligence which it is the carrier's duty to employ. But so far as concerns liability for damage to cargo, his only duty is to avoid such damage, and, if no damage results from his lack of diligence, the carrier is at liberty to be as careless as he pleases. If his lack of diligence does not contribute to the damage, he has used all the diligence that was due, and the proviso is fulfilled. That this is true when the vessel is seaworthy, has already been seen, and it proves that the act is not intended to deprive the owner of exemption, merely because he is careless in equipping his ship. *In short, it means, it is submitted, that the damage for which exemption is granted, must not be damage resulting from failure to employ that*

*See International Navigation Co. v. Farr and Bailey Mfg. Co., 181 U. S. 218, 226.

diligence in preparing the vessel for sea upon the exercise of which the act insists. The proviso is inserted only to make it clear that the exoneration granted is in no way to derogate from the obligation to take due care for seaworthiness. It was necessary to insert it because fault in management might otherwise be supposed to include fault in equipping the vessel for sea. There are English cases in which even the phrase 'improper navigation' was held to include such fault."

Athough the Circuit Court of Appeals in its opinion cited the following cases as supporting its interpretation of Section 3, *International Navigation Co. v. Farr and Bailey*, 181 U. S. 218; *The Southwark*, 191 U. S. 1; *The Wildcroft*, 201 U. S. 378, an examination of the facts in those cases will show that the Court in none of them was called upon to say that if the vessel were unseaworthy, or that due diligence had not been exercised to make her so, the owners would be liable for damages arising from faulty navigation without regard to whether or not there was any causal connection between the lack of due diligence to make the ship seaworthy in all respects and the loss caused by negligence in navigation or in the management of the vessel.

The exact question has never been passed upon by this Court nor so far as we are able to find even discussed by this Court.

There have, however, been cases in District Courts and other Circuit Courts of Appeals where a contrary construction has been placed upon Section 3 of the act.

In *The Turret Crown*, 282 Fed. 354, 359, Judge Ward found that the vessel was unseaworthy in respect to her steering gear at the time she sailed and that the owners had knowledge thereof.

In an opinion, in which he dismissed a libel filed by the cargo-owners, he said:

> "But the question is whether this unseaworthiness, whose defects were fully developed before water got into the fuel tanks, *contributed to the bottom damage which injured the cargo.* Of course, after the fuel oil gave out, the steering gear, even if perfect, would have been of no possible consequence. The deck log continuously describes the behavior of the steamer in the sea down to the time when she turned back as 'rolling heavily.' Rolling does not imply the pitching which causes bottom damage. Even if the vessel fell off so far as to be in the trough of the sea, there would be no pounding. It seems to me that the breaking down of the steering gear, instead of increasing, decreased the strain upon the vessel. (P. 359.)
>
> . . . . . .
>
> "If forcing the steamer into the sea, whether a head sea or a following sea, at a speed sufficient to give steerageway, did contribute to the bottom damage, it was an error in navigation and management of the vessel, for which the claimant is excused by the Harter Act." (P. 360.)

The Circuit Court of Appeals reversed the decree (297 Fed. 766) because it found that the unseaworthy condition of the vessel at the time of the inception of the voyage *had a causal connection* with the damage to the double bottom tanks which caused the damage to the libelants' goods. We quote from the opinion as follows at page 773:

> "We are satisfied that the defects in the steering gear added to the strains on the vessel as qualified experts declared. *The proximate cause of the distress of the ship which ultimately required her to return to port was the defective condition of the steering gear.* The failure of the steering gear and inability to control the vessel

produced a wrenching and straining and pounding of the vessel which in turn resulted in damage to the tanks. It was an unseaworthy condition of the vessel. . . ."

And at page 774:

"The defects in the steering gear were fully developed before there was any trouble with the vessel's fuel tanks. The trouble with the fuel tanks arose some twenty-four hours after the steering gear had developed serious defects and prevented the vessel from being properly steered and required her to stop. . . .

"In the view we take of the evidence, the conclusion is irresistible that the damage to the double bottom tanks of the ship was due to the added strains to which they were subjected by reason of the defective steering gear. In this view of the case, the appellee is liable."

It will be observed therefore that the statement of the law as to causal connection as laid down by Judge Ward was not overruled by the Circuit Court of Appeals, but was in fact practically affirmed, inasmuch as the Circuit Court of Appeals found a causal connection between the unseaworthiness and the negligent navigation which the District Judge had been unable to find.

In *The Turret Crown*, 284 Fed. 439, 444, in the Circuit Court of Appeals for the Fourth Circuit, the opinion of the Court stated that it had before it a copy of the opinion of Judge Ward in *The Turret Crown*, 282 Fed. 354, in the Southern District of New York, in which, as the opinion states, Judge Ward had found that the owners were negligent in failing to correct a defective steering gear, but had found "the cause of the cargo damage was the water taken into the fuel tank through the bottom" and "that this was

not caused by the unseaworthiness of the vessel." The opinion then proceeded to say:

> "If we accept, as we are disposed to do, his finding of the facts in this regard, it would seem to follow, of course, that, *there being no causal relation between the unseaworthiness and the damage*, no advantage may properly be taken of the former."

The Circuit Court of Appeals for the Sixth Circuit, in the *R. P. Fitzgerald*, 212 Fed. 678, 686, said that the statute protects the carrier "if in spite of the negligence and notwithstanding the injury therefrom, his vessel is seaworthy *as against such acts*, or he has used reasonable diligence to make it so."

These are the only cases that we have found directly in point. There are, however, several analogous cases arising under the act for "Limitation of Ship Owners Liability" (9 Stat. 635), in all of which the Court has held that the owner could limit his liability even though he was privy to the unseaworthiness of the vessel *provided said unseaworthiness was not the proximate cause of the loss or disaster.* We refer to the *City of Para*, 44 Fed. 689, 691; *The Thessaloniki*, 267 Fed. 67; *In re Rapid Transit Ferry Co.*, 124 Fed. 786.

In *The Thessaloniki*, the Circuit Court of Appeals for the Second Circuit, in allowing the limitation of liability, said:

> "The only charges of unseaworthiness in the pleadings and in the proofs are connected with the boilers, engines and sounding pipes. We may assume them all to be established and the only result would be delay in the prosecution of the voyage."

There are also analogous cases arising under the International Rules for Prevention of Collisions at

Sea, in which the Courts have held that a vessel is not liable for a collision where she has violated one of the rules, provided this violation has not in any way contributed to or caused the collision. *The Blue Jacket*, 144 U. S. 371; *The Clara*, 55 Fed. 1021; *The La Bretagne*, 179 Fed. 286; *The No. 1*, 180 Fed. 969; *The Morristown*, 278 Fed. 714.

We call the Court's attention to the fact that the parties to these proceedings left no room for doubt as to their understanding of the undertaking, inasmuch as they included in the bill of lading a clause reading:

> "The ship and carrier shall not be liable for loss or damage occasioned by the perils of the seas or other waters . . . collision, stranding or other accidents of navigation of whatsoever kind, even where occasioned by the negligence, default or error in judgment of the pilot, master, mariners or other servants of the shipowner."

We submit, therefore, that both upon necessary principle and upon the sole authorities found in the books, causal connection must be shown between the lack of due diligence to make the vessel seaworthy and the negligent navigation and management in order to deprive the owner of the exemption from liability provided in Section 3 of the Harter Act.

The decision of the Circuit Court of Appeals on this point was entirely decisive of both cargo damage cases. If the Court was wrong in thus construing Section 3, then its reversal of the decrees of the District Court in the cargo damage cases was erroneous, no matter how correct its other findings may have been.

The question is one of great importance to shipowners and underwriters generally, and we respectfully submit that a definite interpretation of Section

3 of the Harter Act by this Court is needed at this time, and that your Honorable Court should grant its writs of certiorari requested in the petition.

Point Two.

The Finding of the Circuit Court of Appeals That the "Willdomino" Deviated By Putting Into the Port of Sydney Finds No Support in the Evidence or the Law.

The "Willdomino" had the right under the bills of lading to go to Sydney. She exercised her rights.

The bills of lading gave the vessel "liberty to call at intermediate ports or any port or ports in or out of the customary route in any order to receive and discharge coal, cargo, passengers and for any other purposes . . ."

> "Eighth: *The ship has liberty of filling up and/or bunkering at any port or ports in or out of the way.*"

It is difficult to imagine any deviation clauses broader than those printed above. Shipowners are clearly allowed the privilege of making such provisions by contract.

In *South Atlantic S. S. Line v. London-Savannah Naval Stores Co.*, 225 Fed. 306, the Circuit Court of Appeals for the Fifth Circuit said of a clause similar to that contained in the bill of lading in these cases (p. 310):

> "There is no law standing in the way of a shipper under a maritime contract binding himself by an agreement that the vessel carrying his goods, constituting only a part of its cargo, is to have the privilege expressed by that provision just quoted."

The distance from Lisbon to New York via North Sydney was only about 300 miles further than the direct route. This was a reasonable additional distance for the vessel to make for the purpose of bunkering.

In *The Blandon*, 287 Fed. 722, it was held, under a clause similar to the first deviation clause contained in the bill of lading and quoted above, that a vessel sailing from New York to Valencia, Spain, had the right to put into Philadelphia, which involved going in and out of the Capes a greater distance than the change made by the "Willdomino" in going to Sydney.

The District Court found that the "Willdomino" was clearly within her rights in going to North Sydney. The Circuit Court of Appeals, although not denying the right of the vessel to go to North Sydney for bunkers for the remainder of the voyage to New York, found as a fact that the vessel went there for the purpose of obtaining bunkers for a subsequent voyage, and that this was a deviation, citing *Austrian Union Steamship Co. v. Calafiore*, 194 Fed. 377. The *Austrian Union S. S. Company* case did not involve the taking on of bunkers for a subsequent voyage, but did involve the taking on of cargo for a subsequent voyage, during the loading of which cargo the fruit cargo already on board suffered serious loss. That case is not an authority in point.

The opinion of the Circuit Court of Appeals herein states "It is true that there is no direct evidence that it was the purpose to obtain at Sydney coal for a subsequent voyage," but draws the inference from the cable of the owners to the master at Gibraltar instructing him to coal at North Sydney and from the testimony in the case that such was the intention.

(a) The cable has been heretofore set forth at length in the petition, *infra* page 6.

The entire direct testimony on this point is that of George T. Williams, president of the petitioner, Convoy Steamship Company, Limited, who was examined at length before the District Judge.

(b) The testimony:

Cross-examination (Record, p. 71, fols. 213-215):

"Q. But did you give your master standing orders to coal at Sydney?

A. I don't know as he had standing orders. We have made it a sort of practice to coal at North Sydney; as I recall it, along about that period we were having great difficulty in getting ship's bunkers on the Atlantic Coast of the United States, as you know in those days there were many embargoes on coal, and so on.

Q. Well, did the master of the *Willdomino* have orders to coal this vessel at Sydney?

A. You mean on this particular voyage?

Q. Yes.

A. I don't know; he might have had; you mean at the time of leaving Lisbon?

THE COURT: If you don't know, why just say so.

Q. Why were you hesitating about that answer?

A. Well, I am hesitating as to whether it was when he was at Lisbon or at Ponta Delgada.

Q. When he was at Ponta Delgada, did he have orders to coal at Sydney?

A. I think he naturally would have had orders to coal at the nearest coaling port, which would have been North Sydney."

Recalled; cross-examination (Record, p. 234, fols. 702-704):

"Q. How big were the bunkers of the *Willdomino*, and how much coal would she take?

A. Permanent bunkers about 650 tons and reserve bunker in her bridge deck about 802 tons.

Q. So she could carry about 1400 tons of coal?

A. 1,450.

Q. Did you anticipate that when the vessel sailed from Ponta Delgada that she would go to Sydney and there take on approximately 1400 tons of coal?

A. No. We may have given him orders to proceed to the nearest coal port, which would have been North Sydney from Ponta Delgada.

Q. If he could have gotten it there, was it the duty of the master when he got to Sydney to fill up his bunkers with coal there?

MR. SPRAGUE: I object to that question as to what the duty of the master was.

THE COURT: I will permit it.

A. It might be considered his duty, but since we were able to get in touch with North Sydney we would have given the instructions."

Recalled; cross-examination (Record, p. 862, fols. 2584-2588):

"Q. When you sent this cable to your master directing him to go to Sydney, didn't you intend that he should at North Sydney take on bunkers for the return trip to Europe?

A. No, sir. We hadn't any voyage fixed.

Q. Well, for the next trip that this vessel should make to sea?

A. *No, sir.*

Q. You didn't intend that he should take on enough coal to go to sea again?

A. *No, sir, hadn't any next voyage in mind.*

Q. Did you intend that he should take on enough coal at North Sydney to coal some other ship of yours from an Atlantic port to sail?

A. *No, sir.*

Q. Now, that is exactly what the *Willdomino* had done on the preceding trip, wasn't it?

A. After we arrived at North Sydney, we did that, yes.

Q. On the preceding trip of the *Willdomino* you had her coal in North Sydney?

A. Yes, sir.

Q. For her requirements to get to New York and then sail again?

A. No, to transfer coal to some other British steamers.

Q. That you owned?

A. That we owned.

Q. Now, then, on that other trip that the *Willdomino* stopped at North Sydney, she was coming from the Baltic Sea, wasn't she?

A. No, sir.

Q. Where was she coming from?

A. St. Nazaire, France.

Q. That is considerably further north than Lisbon, isn't it, that port?

A. Yes.

Q. St. Nazaire was the last place that this vessel stopped in Europe on the preceding trip?

A. It is where she discharged her cargo and sailed for North Sydney under ballast.

Q. Then she wasn't in danger to any other cargo on that preceding trip when she stopped at Sydney for coal, was she?

A. No, sir.

Q. No other cargo to be injured?

A. No cargo aboard of her.

Q. Is that the only other time the *Willdomino* stopped at North Sydney while under your management and before the accident?

A. I think so."

The finding of the Circuit Court of Appeals has been deduced from the realms of speculation and conjecture and is directly contrary to the direct testimony. Its finding should be disregarded by this Court and a finding made in accordance with the testimony. The District Judge found no such intent and it is to be recalled that the District Judge personally saw the witness and had every opportunity to ascertain all the facts in order to clear up any question that might re-

main in his mind with reference to the question of intent. There was no doubt in his mind upon this question and he found there was no such intent. The District Judge's finding is the correct one and we submit is the one to which this Court should give much credit in determining the fact, and if this Court should agree with the District Court in its finding, then the owner is entitled to his bill of lading provisions and, more especially, as to the provision relative to the limitation of $100 per package.

Mere intention does not constitute a deviation unless the intention be consummated.

The Circuit Court of Appeals found that the intention was to obtain at North Sydney bunkers for a subsequent voyage, but the facts are that the *vessel did not actually obtain bunkers at Sydney for a subsequent voyage,* but only sufficient to take her to Halifax, where in turn she got sufficient to bring her to New York. The Circuit Court of Appeals held that this was immaterial, "for it is the purpose of the deviation and not the consummation of that purpose that is the test in the matter of deviation." We respectfully submit that this holding is erroneous inasmuch as it is contrary to the rule laid down by this Court in *Marine Insurance Co. v. Tucker,* 3 Cranch 357, 393, to the effect that an intention to deviate is not a deviation unless the intention be carried into execution. To the same effect *North British & Mercantile Insurance Co. v. H. Baars & Co.,* 255 Fed. 625, 626. If it is intention to do the act rather than the act itself that constitutes deviation, as stated by the Circuit Court of Appeals, then an owner who sent his vessel to a port intending to obtain bunkers for a subsequent voyage and the vessel upon arriving finding the supply limited or the price exorbitant bought only bunkers for the ensuing part of the present voyage would be guilty of devia-

tion, whereas another owner whose ship was making the same voyage and who ordered her to the same port to obtain bunkers for the balance of the present voyage would not be guilty of deviation if upon the ship's arrival and finding coal cheap he should buy a thousand tons of coal for the ensuing voyage.

We submit that the doctrine as laid down by the Circuit Court of Appeals on this point cannot be sustained.

If the finding of the Circuit Court of Appeals on deviation is not to be disturbed nevertheless the deviation as a matter of law was justifiable.

The Court found that the "Willdomino" did not have sufficient coal at Lisbon or Ponta Delgada to enable her to reach New York.

The law is well settled that under such circumstances it was the duty of the master to put into Sydney, which was the nearest port, to save the ship, cargo and crew.

The Circuit Court of Appeals for the Fourth Circuit in *The Turret Crown,* 284 Fed. 439, and the Circuit Court of Appeals of the Second Circuit in a case of the same name, *The Turret Crown,* 297 Fed. 766, both held that the act of the master in putting into a port of refuge to save the ship, cargo and crew was a justifiable deviation *although the predicament in which he found himself was caused by the owner sending the vessel to sea in an unseaworthy condition.*

Both of these cases follow *Kish v. Taylor,* (1912) A. C. 604, in the House of Lords, which reversed the judgment in that case reported in (1911) 1 K. B. 625, and upheld the decision of Walton, J., in (1910) 2 K. B. 309.

The following is the language of *Kish v. Taylor* as quoted in *The Turret Crown*, 284 Fed. 439, 446:

> " . . . It is prima facie not only the right but the duty of the master of a ship to deviate from the course of his voyage and seek a harbor or place of safety, if that be reasonably necessary in order to save his ship and the lives of his crew from the perils which beset them. . . .
>
> . . . . . .
>
> "So that the question for decision, resolves itself into this: Is it the presence of the peril and not its cause which determines the character of the deviation, or must the master of every ship be left in this dilemma, that whenever, by his own culpable act, or a breach of contract by his owner, he finds his ship in a perilous position, he must continue on his voyage at all hazards, or only seek safety under the penalty of forfeiting the contract of affreightment? Nothing could, it would appear to me, tend more to increase the dangers to which life and property are exposed at sea than to hold that the law of England obliged the master of a merchant ship to choose between such alternatives."

For the purpose of correcting the errors of the Circuit Court of Appeals, it is respectfully submitted that your Honorable Court should grant its writs of certiorari in these cases.

Point Three.

The Circuit Court of Appeals Was in Error in Holding That the Citrate of Lime Was Not in Specie at the Time Delivery Was Tendered to the Respondent Pfizer & Company, Incorporated, and in Reversing the Decree for Petitioner on the Cross-Libel for Freight.

The bill of lading for the citrate of lime shipped to the respondent Charles Pfizer & Company, Incorpo-

rated, contained the following provisions regarding payment of freight:

> "Freight on the goods and charges as per margin New York, ship lost or not lost.
>
> "Ninth. Full freight is due on damaged goods and on all goods diminished by leaking . . ."

The rule is well established that freight is due upon tender of delivery of shipment, unless "there has been a destruction of the article in specie", *Hugg v. Augusta Insurance & Banking Co.*, 7 How. 595, 606, and cases therein cited; *Washburn & Moen Mfg. Co. v. Reliance Marine Insurance Co.*, 179 U. S. 1, 9; *Scrutton on Charter Parties*, 9th Ed., Article 141; *Abbotts Law of Merchant Ships and Shipping*, 14th Ed., pages 701, 711.

Citrate of lime consists of chalk as a carrier for citric acid. The citric acid content in the citrate of lime when shipped was 64 per cent., according to the invoice. The citric acid content of the samples of the damaged citrate of lime taken at the time the vessel was in drydock varied from 26 to 42 per cent., without taking into account the amount of water in the samples, which was about 50 per cent. Taking into account the water in the samples when the test was made, the citric acid content of these samples of the damaged merchandise was about 60 per cent. on the dry basis, which was the basis used on the invoice of the sound goods. There was therefore merely a loss of about 7 per cent. in the citric acid content of the citrate of lime. The citric acid content is the only element of value in citrate of lime, and the combination of the citric acid with the chalk is used merely for the purpose of convenient transportation of the citric acid. No chemical reaction results from the immersion of citrate of lime in sea water and no change is made

in the compound thereby except that bacteriological growth takes place for a time during which the citric acid content is slightly diminished. It therefore appears that the goods in their damaged condition were still citrate of lime and in specie and that the petitioners were entitled to their freight thereon under the terms of the bills of lading. The only basis given by the Circuit Court of Appeals for its finding that the goods were not in specie was that the petitioner sold the damaged merchandise for about $3000 after the respondent Charles Pfizer & Company, Incorporated, had refused to accept tender of delivery and had abandoned it to the petitioner and had told the petitioner that it was a total loss. We submit that this is no basis for such a finding in view of the uncontradicted testimony in the case, which has been summarized above.

Conclusion.

The points upon which the petitioners rely have been clearly set forth in the headings and argument in this brief. We feel that these are proper cases for the issuance of writs of *certiorari*.

Respectfuly submitted,

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(3)

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Supreme Court of the United States

Nos. 165, 166, 167. October Term, 1925.

Steamship "WILLDOMINO", Her Engines, Boilers, Etc.,
Petitioner (Respondent Below),
against
CITRO CHEMICAL COMPANY OF AMERICA,
Respondent (Libellant Below).

Steamship "WILLDOMINO", Her Engines, Boilers, Etc.,
Petitioner (Respondent Below),
against
CHARLES PFIZER & COMPANY, Inc.,
Respondent (Libellant Below).

CONVOY STEAMSHIP COMPANY, Ltd., Owner of the Steamship "WILLDOMINO", Her Engines, Boilers, Etc.,
Petitioner (Libellant Below),
against
CHARLES PFIZER & COMPANY, Inc.,
Respondent (Respondent Below).

On Writs of Certiorari to the Circuit Court of Appeals for the Third Circuit.

Brief for Petitioners.

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IN THE

Supreme Court of the United States.

STEAMSHIP "WILLDOMINO," HER ENGINES, BOILERS, ETC., *Petitioner (Respondent Below),* *against* CITRO CHEMICAL COMPANY OF AMERICA, *Respondent (Libellant Below).*	October Term, 1925. No. 165.

STEAMSHIP "WILLDOMINO," HER ENGINES, BOILERS, ETC., *Petitioner (Respondent Below),* *against* CHARLES PFIZER & COMPANY, INC., *Respondent (Libellant Below).*	October Term, 1925. No. 166.

CONVOY STEAMSHIP COMPANY, LTD., Owner of the Steamship "Willdomino," Her Engines, Boilers, Etc., *Petitioner (Libellant Below),* *against* CHARLES PFIZER & COMPANY, INC., *Respondent (Respondent Below).*	October Term, 1925. No. 167.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR PETITIONERS.

Official Reports of the Opinions Below:

The opinion of the District Court (R. 1360) has not been reported.

The opinion of the Circuit Court of Appeals (R. 1425) is reported in 300 Fed. 5.

Statement of the Grounds on which the Jurisdiction of this Court is invoked:

(1) The decrees to be reviewed are those of the Circuit Court of Appeals, dated June 4, 1924 (R. 1441).

The petitions for writs of certiorari were filed September 3, 1924, and the writs were granted October 27, 1924.

(2) The jurisdiction of this Court is based upon the Circuit Court of Appeals Act, March 3, 1891; 26 Stat. 828; 2 Comp. Stat., Sec. 1217.

See *Lutcher & Moore Co. v. Knight*, 217 U. S. 257.

Statement of the Cases:

These cases are here on *writs of certiorari* to the United States Circuit Court of Appeals for the Third Circuit. The petitions were granted by this Court at the October, 1924, Term. The Circuit Court of Appeals reversed the decrees of the District Court, which had dismissed the two libels of the shippers against the "WILLDOMINO" for cargo damage, and had entered a decree in favor of the owner of the "WILLDOMINO" on the cross-libel against the shipper, Pfizer & Company, Inc., for freight. The libels of the shippers, Pfizer & Company, Inc., and Citro Chemical Company of America, were *in rem* and followed the usual form of cargo damage actions alleging respectively that the libellant was the consignee and owner of a consignment of citrate of lime shipped on the "WILLDOMINO" as a common carrier, at Messina, Sicily, on June 10, 1920, in good order and condition, to be carried and delivered in like good order and condition to libellants at New York in accordance with

the terms of the bill of lading. The libels then alleged that upon tender of delivery to libellants, the goods were not in like good order and condition as when shipped, "but short, slack and seriously injured and damaged" (R. 3-5; 25-28). The vessel was seized by the marshal under process in each action.

Convoy Steamship Company, Ltd., filed claims to the "WILLDOMINO" as owner in both cases and obtained her release upon giving stipulations for value, and thereafter filed answers admitting the receipt of the merchandise on board the "WILLDOMINO," the issuance of bills of lading and the tender of delivery to libellants at New York. It pleaded as separate defenses (1) the exemption clause contained in the bills of lading against loss by "collision, stranding or other accidents of navigation"; (2) the provisions of the Harter Act, and (3) the agreed valuation clause in the bills of lading of $100 per package (R. 6-13; 28-37).

Convoy Steamship Company, Ltd., also filed a cross-libel against the shipper libellant, Pfizer & Company, Inc., for unpaid freight on the merchandise for damage to which one of the original libels had been filed (R. 46-49). Pfizer & Company, Inc., answered the cross-libel, admitting that it had refused to accept the merchandise or pay the freight thereon upon the ground that it was not *in specie* (R. 49-52).

The three cases were ordered tried together by Judge Lynch in the United States District Court for the District of New Jersey in admiralty, and were printed in one record and argued together as one appeal and briefed as one appeal before the Circuit Court of Appeals and will be so argued and briefed together before this Court.

The petitioner took the testimony of the officers of the "WILLDOMINO" and the witnesses at Halifax on oral deposition. On February 1, 1923, the cases came on for trial in the United States District Court for the District of New Jersey, and were tried together. The trial continued for five days, February 1, 2, 26, 27 and 28, 1923. A number of witnesses were examined in open court.

The District Court filed its written opinion (R. 1360-1386), dismissing the shippers' libels for cargo damage and ordering a decree in favor of petitioner on the cross-libel for freight. Final decrees were entered on May 15, 1923, in the three cases (R. 1387, 1400, 1412). Notices of appeal were filed May 21, 1923 (R. 1389, 1402, 1414). The cases were argued before the Circuit Court of Appeals on January 28, 1924 (R. 1424). On June 4, 1924, the Circuit Court of Appeals handed down its opinion reversing the three decrees of the Court below (R. 1425-1440).

A petition for a rehearing was filed by petitioner on July 3, 1924 (R. 1443-1458), and denied on July 26, 1924 (R. 1458-1459). Petitions for writs of *certiorari* were filed in this court on September 3, 1924, and the writs were granted October 27, 1924 (R. 1460).

The District Court found that (1) the vessel was seaworthy upon leaving Messina; (2) she was justified under the deviation clause in the bills of lading in going to North Sydney, C. B.; (3) the stranding occurred at a time when competent mariners were exercising due care and diligence, and such stranding was the "proximate cause of the damage inflicted on the citrate of lime by sea water" and petitioner was relieved from liability therefor by the terms of the bills of lading; (4) the petitioner exercised reasonable care of the damaged merchandise after the stranding; (5) the petitioner was entitled to freight on the damaged cargo of respondent, Pfizer & Company, Inc. (R. 1360-1386).

The Circuit Court of Appeals found that (1) the stranding was due to negligent navigation in that the master failed to take sufficient soundings; (2) the ship and the carrier were not entitled to the protection of the provisions in the bills of lading which exempted the ship and the carrier from liability for negligent stranding, inasmuch as these provisions were ineffective so far as they went beyond Section 3 of the Harter Act, and immaterial so far as they gave the same relief as Section 3 of the said Act; (3) the "WILLDOMINO" was unseaworthy upon sailing from Lisbon and

from Ponta Delgada because she had insufficient bunker coal to reach New York, but that this unseaworthiness did not contribute to the cargo damage, the damage being due to negligent navigation and not to unseaworthiness; (4) the ship and carrier were not entitled to the protection of Section 3 of the Harter Act, because the vessel, upon sailing from Lisbon and from Ponta Delgada, was unseaworthy for lack of sufficient bunker coal to reach New York and petitioner did not use due diligence to make her seaworthy in that respect; (5) the vessel went to North Sydney, C. B., for bunker coal for an ensuing voyage as well as for bunker coal to complete her voyage to New York and this was a deviation depriving the vessel and the petitioner of the protection of the agreed valuation clause in the bill of lading; (6) the petitioner failed to take reasonable care of the damaged merchandise after the stranding in that it did not discharge it when the vessel was first drydocked for survey; (7) the merchandise belonging to the respondent, Pfizer & Company, Inc., was not *in specie* when tendered for delivery, and respondent was not liable for the freight thereon (R. 1425-1440).

Statement of Facts.

The petitioner was the owner of the "WILLDOMINO," a steel cargo vessel of 8800 tons deadweight, built in 1919 (R. 58), under the supervision of Lloyd's Register of Shipping, and holding its highest classification for both hull and machinery (R. 875, 918). At Messina, Sicily, on June 10, 1920, she loaded two lots of citrate of lime for delivery at New York, one of 335 casks, of which the respondent, Pfizer & Company, Inc., later became owner, and the other of 168 casks, of which the Citro Chemical Company of America later became the owner. Bills of lading were issued (R. 916, 917), the material portions of which were as follows:

> "SHIPPED by . . . to be transported by the good Steamship 'WILLDOMINO' . . . to NEW YORK with lib-

erty to call at Intermediate Ports or any port or ports in or out of the customary route in any order, to receive and discharge coal, cargo, passengers, and for any other purposes, . . .

"It Is Mutually Agreed as Follows: First: The Ship and carrier shall not be liable for loss or damage occasioned by the perils of the seas or other waters . . . or unseaworthiness of the ship even existing at time of shipment or sailing on the voyage, provided the owners have exercised due diligence to make the vessel seaworthy, by collision, stranding, or other accidents of navigation of whatsoever kind. . . .

"Third: The value of package receipted for as above does not exceed the sum of One Hundred Dollars, unless otherwise stated herein, on which basis the rate of freight is adjusted.

"Eighth: The ship has liberty of filling up and or bunkering at any port or ports in or out of the way.

"Filling up only in ports on the way Westwards of (*sic*) New York." (Clause Eighth was in heavy faced type, the last clause was in handwriting.)

The citrate of lime was a white powder, consisting of chalk impregnated with condensed lemon juice (R. 707), and was in casks weighing, when filled, 1500-1700 pounds apiece (R. 680). It comprised only 10 to 15 per cent. of the vessel's entire cargo (R. 226), and was stowed in No. 1 lower hold.

The vessel sailed from Messina on June 11, 1920, and arrived at Gibraltar, her next port, on June 16 (R. 276), where the master received a cable from petitioner's New York office reading as follows:

> **"Your coal requirements excessive cost of bunkers Gibraltar very high make accurate measurement remaining bunkers if not enough to make North Sydney take only enough to reach there cut down consumption in every way if fuel runs short reaching coast cut out one boiler." (R. 1090.)**

Gibraltar is the usual bunkering port for the western Mediterranean and the "Willdomino" loaded 400 tons of

bunker coal there (R. 276). She had 766 tons of coal on board (R. 1195) when she sailed from Gibraltar on June 17th for Lisbon, where she arrived June 19th. She remained at Lisbon, loading a considerable quantity of cork, which completed her cargo, until June 24th, when she sailed (R. 277).

On June 29th, four days after leaving Lisbon, a breakdown occurred in the vessel's turbines which both courts below found was not attributable to lack of care or diligence (R. 1375, 1433). This breakdown put the high pressure turbine out of commission. Temporary repairs were made at sea by the ship's engineers which enabled her, upon her low pressure turbine alone (R. 82), and at reduced speed and with increased coal consumption, to proceed to Ponta Delgada, Azores, for necessary repairs and supplies.

She arrived at Ponta Delgada on July 3d; was surveyed, made such repairs as were possible, there being no facilities at that port to repair the high pressure turbine (R. 283), obtained supplies, including 250 tons of bunker coal, and sailed from Ponta Delgada on July 10th, still using her low pressure turbine alone.

ERRATUM.

Page 7, line 23. Strike out as incorrect statements the six lines beginning "The vessel took a Great Circle Course etc." and ending "(R. 1044, 1239)," and substitute the following:

> "The first five days out of Lisbon were on a direct course to North Sydney. Engine trouble then took the vessel South to Ponta Delgada. Her course from there for the first six days was rather more southerly than a direct course to North Sydney. But this was a month dangerous for icebergs and safety may have seemed to the Master to require such a course. The actual course for these six days was neither directly to North Sydney nor to New York, but was about midway between. On the sixth day the course was changed from N. 74° W. to N. 51° W. and a Great Circle Course taken to North Sydney. (R. 1046, 1048). This course has been plotted on a Government chart from the Log entries (R. 1010-1028, 1034-1058), copies of which chart will be produced at the argument."

thick fog which continued through the night and at 6.30 A. M. of the 24th, she stranded at her bow (R. 287, 319), when she was about seven miles from Gannett Rock (R. 291). The master, who had been on the bridge all night, believed he was twenty miles off the shore, and a sounding taken at 4.30 A. M. had indicated this to be the fact (R. 287).

No. 1 hold at once filled with water to a depth of twenty-one feet on the starboard side and eighteen feet on the port side (R. 354, 1063), which covered the citrate of lime. The vessel was backed off into deep water and, after her trim had been improved by the use of the ballast tanks, she finally proceeded to Halifax, where she arrived at 2.12 A. M. on July 27th.

Upon arrival at Halifax the vessel was surveyed by the port warden and representatives of Lloyd's and the London Salvage Association. There being no drydock available (R. 538, 546, 570), all the surveyors recommended that the vessel proceed to New York under convoy, her trim having been corrected by placing additional ballast at her stern, with proper precautions to prevent the water from working aft from No. 1 hold, in which it was confined.

These recommendations were carried out. The vessel sailed from Halifax August 3d and arrived at New York without incident on August 7th (R. 298). She docked at Jersey City on August 9th, where lemons, which constituted the larger part of her cargo, were discharged. She completed discharging the lemons on August 19th and then proceeded to 134th Street, New York City, in order to unload her cork cargo, much of which was on top of the citrate of lime in No. 1 lower hold (R. 299).

After the discharge of the cork, she was drydocked at Hoboken, N. J., for a survey and to prepare specifications for repairs. She remained in drydock for twenty-six hours (R. 81). On August 28th she was again in drydock for eight hours, while the contractor who had been awarded the repair work, prepared patterns for her stem and plates (R. 82). She was then put into the water while these parts were

being fabricated. She was again put in drydock on September 21st, where she remained until October 2d, while the new parts were placed in position. On October 2d she left the drydock, her repairs having been completed. The citrate of lime was then discharged from No. 1 hold and tendered to the respondents, who refused to accept delivery and abandoned it to the petitioner (R. 1324-5). The petitioner sold it for about $3000 (R. 191).

The petitioner had no knowledge of the characteristics of citrate of lime (R. 114, 217). Respondents who were dealers in the commodity and fully acquainted with its characteristics, did not advise petitioner thereof; nor, after the stranding, did they at any time suggest to petitioner any measures that should be taken to protect it from any further damage (R. 114, 217).

Surveyors for respondents' underwriters on August 23d and also a day or so later opened and examined some of the casks on the top row which were then out of water and took samples (R. 197). On August 28th, when the vessel was in drydock, they took other samples (R. 251). These samples were submitted by them to chemists for analysis, who reported on September 2 (R. 903). On the basis of the chemist's report the surveyors advised the underwriters "that it appeared to be that the cargo was worthless" (R. 257). Respondent Pfizer informed the petitioner on September 2 that the goods were apparently a total loss (R. 891).

The respondent Pfizer notified its underwriter that the goods were a total loss (R. 198), and collected its insurance (R. 682). Apparently the respondent Citro Chemical Company did likewise (R. 257). The present actions are, we assume, prosecuted for the benefit of the underwriters.

Specifications of Error Intended to be Urged:

(1) The Circuit Court of Appeals erred in finding that the stage of the voyage beginning at Lisbon and the stage resumed at Ponta Delgada was to New York, and that the

vessel was unseaworthy by reason of sailing from those ports with insufficient bunkers to reach New York, whereas, on the contrary, the stage was from Lisbon to North Sydney (later from Ponta Delgada to North Sydney) and the ship when sailing from both ports had sufficient bunkers to reach North Sydney.

(2) The Circuit Court of Appeals erred in finding that stopping at North Sydney was a deviation.

(3) The Circuit Court of Appeals erred in finding that the vessel went to North Sydney for bunkers for a subsequent voyage, whereas the only direct evidence in the case was that she went there only for coal for the voyage to New York and the finding of the court was based on mere inferences and mathematical computations.

(4) The Circuit Court of Appeals erred in finding that the ship went to North Sydney for coal for a subsequent voyage, although that issue had not been raised in the pleadings or at the trial or in the opinion of the trial court.

(5) The Circuit Court of Appeals erred in finding that the ship went to North Sydney with an intent to load coal for a subsequent voyage and in holding that the fact that she did not take on coal there for a subsequent voyage was immaterial.

(6) The Circuit Court of Appeals erred in holding that it was unnecessary to show a causal connection between the alleged lack of due diligence to make the vessel seaworthy and the negligent navigation causing cargo damage in order to deprive the ship owner of the exemption from liability for the damage given by Section 3 of the Harter Act.*

(7) The Circuit Court of Appeals erred in holding that the petitioner failed to take reasonable care of the damaged merchandise after the stranding, in that it did not discharge it when the vessel was first drydocked for survey.

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*The text of the Harter Act is printed in the Appendix.

ARGUMENT.

Summary of Argument.

I. The voyage of the "WILLDOMINO" was by stages. The stage beginning at Lisbon was to North Sydney; it was not to New York, as found by the Circuit Court of Appeals. The vessel was ordered by her owner to go to North Sydney, and these orders were literally obeyed. A turbine breakdown interrupted the stage from Lisbon to North Sydney and caused the vessel to put into Ponta Delgada, Azores Islands. Her orders were not changed at Ponta Delgada and upon completion of repairs she resumed the stage of her voyage to North Sydney. She had sufficient bunker coal to reach North Sydney both upon sailing from Lisbon and from Ponta Delgada. She reached North Sydney with coal to spare. The Circuit Court of Appeals, therefore, erred in holding that she was unseaworthy upon sailing from Lisbon and from Ponta Delgada because of insufficiency of bunker coal to reach New York.

II. The "WILLDOMINO" did not deviate in going to North Sydney. The bills of lading gave her broad liberties to go to ports for bunkering, even though such ports were off the customary route. This justified her in going to North Sydney for sufficient bunkers to reach New York, which is all that she did. It also would have justified her in taking on bunkers to get away from New York, as well as to get there, if she had done so. The finding of the Circuit Court of Appeals that she went to North Sydney for bunkers for an ensuing voyage was erroneous. It was not raised in the pleadings or at the trial and was against the only *direct* evidence on the point. This finding was based entirely on inference and conjecture. It held that an unfulfilled intention to deviate is a deviation, which is contrary to the decisions of this court.

III. The respondents' cargo was damaged by sea-water as a result of the stranding of the "WILLDOMINO," which was caused by negligent navigation. The alleged unseaworthiness of the "WILLDOMINO" (and the owners' lack of due diligence to make her seaworthy in this respect) was in no sense causally connected with the stranding and the consequent damage to the cargo. Both courts below so found. Consequently, the Circuit Court of Appeals was in error in holding that the vessel and carrier were not exempted from liability by Section 3 of the Harter Act. This point has never been before this court for decision. There are, however, decisions in the Circuit Court of Appeals and District Court which hold that in order to deprive the ship and carrier of the exemption from liability for negligent navigation and management given by Section 3 of the Act, a causal connection must be shown between the unseaworthiness and the disaster causing the damage. These decisions are based on sound principles of law and statutory construction. Any other interpretation of Section 3 would lead to injustice and absurd conclusions.

IV. The petitioner took reasonable care of the damaged goods after stranding. The only respect in which the Circuit Court of Appeals held that it failed to take such care was in not unloading the damaged goods when the "WILLDOMINO" first went into drydock for preliminary survey for repairs. The goods had then been under water for a period of thirty-two days and both parties believed they were a total loss and that there was nothing of value to be saved. The petitioner was unfamiliar with the properties of the goods and respondents gave it no information or suggestions. On the contrary, respondents then informed petitioner that the goods were a total loss.

The entire record is before this court on writs of certiorari for its examination.

Lutcher & Moore Co. v. Knight, 217 U. S. 257, 267.

> "It is undoubted that by the operation of the writ of certiorari, . . . the entire record is before us with power to decide the case as it was presented to the Circuit Court of Appeals, by reason of the writ of error issued out of that court. Certain is it also that the Judiciary Act of 1891 contemplates that, as a general rule, where under its provisions a case comes to this court on certiorari . . . it will be disposed of so that the mandate of this court, to avoid circuity will go directly to the Circuit (district) Court."

To the same effect see *Delk v. St. Louis & S. F. R. R. Co.*, 220 U. S. 580; *The Conqueror*, 166 U. S. 110.

POINT I.

The "Willdomino" was seaworthy because she had sufficient bunker coal to reach North Sydney upon leaving Lisbon and upon leaving Ponta Delgada.

The only respect in which respondents contended that the "Willdomino" was unseaworthy was "in the matter of sufficiency of fuel" (R. 1430). The District Court held that the vessel was seaworthy (R. 1374). The Circuit Court of Appeals held that this was a voyage by stages, following *Thin v. Richards & Co.*, (1892) 2 Q. B. 141, 144; *The Vortigern*, (1899) P. 140, and that due diligence must be shown by the owners to supply the vessel with sufficient bunkers at the beginning of each stage of the voyage for the purposes of that stage (R. 1430).

The first stage was from Messina to Gibraltar and the second from Gibraltar to Lisbon. At the beginning of each of these stages the vessel had an adequate supply of bunkers for the stage (R. 1431).

At Gibraltar the captain received a cable from his owners reading as follows:

> "Your coal requirements excessive cost of bunkers Gibraltar very high make accurate measurement remaining bunkers if not enough to make North Sydney take only enough to reach there cut down consumption in every way if fuel runs short reaching coast cut out one boiler" (R. 1090).

This was a definite order to make the next stage of his voyage *Lisbon to North Sydney.**

Counsel for respondents in their brief in the Circuit Court of Appeals conceded this, and that this order was literally carried out.

New York is 2905 miles from Lisbon (Reed's Tables of Distances, p. 140); Sydney is only 2260 miles.

In these days of easy communication by cable and wireless, the owners, rather than the masters of tramp steamers that seek cargo at many ports, fix the stages of the voyage. There have been no reported cases where this point has been raised. However, in *The Vortigern,* (1899) P. 140, 147, the trial Court speaks of the master as fixing the next stage, while the Court of Appeal, at page 155 of the same report, speaks of the shipowner as determining the stages. In *Greenock SS. Co. v. Maritime Insurance Co., Ltd.,* 2 K. B. (1903) 657, 661, the Court says that the "*shipowner* taking advantage of this method of satisfying the implied warranty, must make up his mind to what port he intends to proceed; and he will only satisfy the warranty if he takes on board a sufficiency of coal for that contemplated voyage."

The stage of the voyage from Lisbon to North Sydney was definitively fixed by the petitioner's cabled orders to the master at Gibraltar, and was never changed.

The vessel had sufficient bunker coal for a voyage to North Sydney when she sailed from Lisbon. The distance

*Unless otherwise stated all italics herein are our's.

was 2260 miles and she had 651 tons of bunker coal. At the speed of seven and three-quarter miles per hour, which the Circuit Court of Appeals held she was entitled to expect to make (R. 1432), she would require 12.15 days for the stage, which with a daily coal consumption of forty-two tons would require 510 tons, leaving 141 tons, or approximately three days' surplus supply upon arrival at North Sydney. A breakdown of the high pressure turbine, which both courts below held was not attributable to negligence (R. 1375, 1433), caused the vessel to go to Ponta Delgada for repairs and supplies.

There was no change of orders at Ponta Delgada. The master proceeded on the stage he had been compelled to discontinue when the breakdown occurred, *i. e.*, to North Sydney. He followed a Great Circle Course which in prac-

ERRATUM.

Page 15, line 15. Strike out from the sentence beginning "He followed a Great Circle Course, etc." to the end of the paragraph and substitute the following:

> "For six days he followed a course which was neither directly to North Sydney nor to New York, but was about midway between, and then changed the course directly to North Sydney (R. 1046, 1048). See course plotted on a Government Chart from the Log entries which will be produced at the argument."

North Sydney.

In this argument they failed to give any consideration to the fact that log entries of distance traveled are computed from observations, dead reckoning and readings from the taffrail log (which works somewhat like a speedometer), in all of which there is the possibility of mechanical and human error. Counsel also made the extraordinary argument that this trifling and negligible difference in distance constituted of itself a deviation.

Such an argument requires no discussion here.

The vessel had 629 tons of bunker coal when she left Ponta Delgada (R. 1229). The distance to North Sydney from St. Michaels, Azores (the island of which Ponta Delgada is the chief port) is 1645 miles (Reed's Table of Distances, p. 142), and that from Ponta Delgada must be about the same. At seven and three-quarter miles per hour it would require 8.84 days for the stage which, with a daily coal consumption of forty-two tons, would require 371 tons, leaving 258 tons or approximately six days' surplus supply upon arrival at North Sydney. Actually the vessel required 12.125 days for the stage and arrived at North Sydney with sixty-one tons of coal in her bunkers, having averaged only five and three-quarter miles per hour on a daily coal consumption of 46.75 tons, because she was proceeding on her low pressure turbine alone.

The Circuit Court of Appeals (R. 1431-1434) in finding that the stage was from Lisbon and Ponta Delgada to New York, overlooked the outstanding fact that the "Willdomino" actually sailed from Lisbon and Ponta Delgada to North Sydney under express orders of her owners.

There is evidence that the captain had in his mind some hope of making New York; also the heading of the log books upon leaving Lisbon indicated that New York was the destination (a mere headline tag to designate this voyage). These facts are negligible in view of the express orders of the owners at Gibraltar to go to North Sydney, which orders were literally obeyed.

It also appeared that the vessel "cleared" at Lisbon and Ponta Delgada for New York, but a clearance only specifies the ports for which the vessel has cargo and not bunkering ports on the way, as we shall show hereafter.

Disregarding these incidental and unimportant facts, the main fact remains that the captain had orders from his owners to go to North Sydney and in obedience thereto he did sail to that port and arrived there in safety with a surplus of coal.

We call attention to the fact that the next stage was

from North Sydney to Halifax. There is no contention that the vessel had insufficient coal for this stage. It was upon this stage that the stranding occurred.

We submit that the Circuit Court of Appeals was in error in holding that the vessel was unseaworthy when she sailed from Lisbon and Ponta Delgada.

POINT II.

The voyage to North Sydney was not a deviation. The Circuit Court of Appeals erred in finding that it was a deviation.

(a) *The liberties of the bills of lading gave the "Willdomino" the right to go to North Sydney for sufficient bunkers to carry her to New York.*

The District Court found that the "WILLDOMINO" was not guilty of a deviation in putting into North Sydney (R. 1376-1380), holding that the bill of lading provisions were broad enough to justify it.

The Circuit Court of Appeals, while it did not expressly admit that the vessel was justified in going to North Sydney for sufficient bunkers to reach New York, yet, in effect, it did so because it passed by that question without deciding it and went on to find that the voyage to North Sydney was made with the intention of purchasing coal for a subsequent voyage which it held was a deviation. (R. 1437-9.)

The relevant provisions of the bill of lading (R. 916, 917) were as follows:

> "Shipped by, or received for shipment . . . to be transported by the good steamship WILLDOMINO . . . .to New York with liberty to call at INTERMEDIATE PORTS or any port or ports in or out of the customary route in any order, to receive and discharge coal, cargo, passengers and for any other purposes.
>
> "Eighth: The ship has liberty of filling up and or bunkering at any port or ports in or out of the way.

"Filling up only in ports on the way westwards of (*sic*) New York."

(Clause Eighth was printed in the Bill of Lading in heavy face type; and the last clause was in handwriting.)

The liberty of bunkering in the printed clause was not narrowed by the clause in handwriting. "Filling up" refers only to cargo and not to fuel for bunkers, as appears from clause *Eighth*, where "filling up" is distinguished from "bunkering." This was so held by both courts (R. 1379, 1432).

The District Court was amply sustained under the authorities, in holding that the "WILLDOMINO" had a right to go to North Sydney for bunkers. The parties had provided by their contract that she was to have such a right.

Where the bill of lading contains a clause providing that the vessel may call *"at any port or ports in or out of the customary route in any order,"* or other words of similar import, it is uniformly held that the ship is entitled to proceed to and stop at ports which are off the regular and customary route (if such changes are reasonable). Such a departure is not a deviation, because the parties have agreed that it shall not be. The following are the cases which bear the closest resemblance on the facts to the case at bar:

South Atlantic S. S. Line v. London Savannah Naval Stores Co., 255 Fed. 306 (C. C. A. 5).

In this case a freight contract which provided for the transportation of goods from Pensacola, Florida, to Bristol, England, upon the terms of a bill of lading incorporated therein by reference, was before the court for interpretation. The bill of lading gave the vessel liberty "to call at any port or ports in or out of the customary route." The Court held this provision entitled the owner to send the ship from Pensacola to Bristol via continental ports which were clearly off the route.

The Blandon, 287 Fed. 722, 725 (S. D., N. Y.).

Here cargo was loaded at New York for transportation to Valencia, Spain, under a bill of lading giving the vessel "liberty to call at any port or ports in or out of the customary route in any order." The vessel proceeded from New York to Philadelphia, thirty hours' sailing distance away, and obviously off the route to Valencia. At Philadelphia she loaded additional cargo. The Court held that this was not a deviation.

The Panola, 1925 A. M. C. 1173 (C. C. A. 2).*

In this case the vessel, after loading cargo at Philadelphia for Helsingfors, Finland, sailed to New York where she discharged cargo for New York that had been loaded in Europe. She also loaded New York cargo for Helsingfors, after which she returned to Philadelphia and loaded additional cargo for Helsingfors before sailing for that port. The bill of lading gave the vessel liberty to

> "remain in port, proceed by any route and deviate from or change the advertised and intended route at any stage of the voyages and may proceed to and stay at any places whatsoever, although in a contrary direction to or outside of, or beyond the usual route to the said port of discharge once or oftener, in any order, backwards or forwards . . ."

Suit was brought by the owner of the cargo first loaded at Philadelphia for Helsingfors, upon the ground that the vessel had deviated and was responsible for damage caused by the delay. The Court held that the vessel had not deviated.

Hadji Ali Akbar & Sons Ltd. v. Anglo Arabian & Persian S. S. Co., 11 Com. Cas. 219.

Here goods were shipped from a Persian port to London, England, under a bill of lading which gave the vessel liberty

*Not yet reported in Federal Reporter.

"to proceed to or call in any order for any purpose at any port or ports whatsoever, although in a contrary direction to or out of or beyond the ordinary route, all of which ports shall be deemed to be included within the intended voyage. . ." with further liberty to "transship or land and store . . . and thence reship. . ."

The vessel landed the goods at Cardiff and transhipped them by another vessel to London. It was held that this was not a deviation.

Attorney General v. Benjamin Smith & Co., 34 T. L. R. 566 (H. of L.).

Goods were shipped during the World War from Melbourne, Australia, to London, England, under a bill of lading providing that it was "via ports subject to Government requirements" with liberty to the vessel to proceed and stay at any ports or places "notwithstanding that such ports or places are out of or away from the customary and geographical route . . ." (The Bill of Lading provisions are given in the opinion of the Court of Appeal, 33 T. L. R. 342.) The vessel landed other cargo at Mudros and Imbros, Turkish Islands in the Aegean Sea near the Thracian Coast and stayed there some time, acting as a floating storehouse for the British authorities. The Court held that the liberties in the bill of lading justified the vessel in stopping and discharging cargo at these islands, although this "involved a detour far out of the ordinary course of a voyage between Melbourne and London," but that it did not justify the vessel in remaining there after the discharge of the cargo for governmental purposes.

To the same effect, see:

Citta di Messina, 169 Fed. 472 (S. D. N. Y.);
Austrian Union SS. Co. v. Calafiore, 194 Fed. 377 (C. C. A. 5);

Emelia S. de Perez, 287 Fed. 361, 1923 A. M. C. 42 (S. D. N. Y.); affirmed without opinion 288 Fed. 1019;

The Tokuyo Maru, 7 Fed. (2d) 889, 1925 A. M. C., 1420 (N. D. Cal.).

Cases in which a vessel has been held to have deviated are based upon different liberty clauses in the bills of lading and upon different circumstances. They are not relevant here.

The application of the rule to be deduced from the above cases to the facts of the case at bar unquestionably leads to the conclusion that the "WILLDOMINO" was justified in putting into North Sydney to obtain bunkers. The general liberty clause in the bills of lading entitled her to call not only at "Intermediate Ports" but also at *"any port or ports in or out of the customary route in any order."* As if not satisfied with this the parties in the eighth clause further specifically agreed that the ship was to have liberty of "filling up and or bunkering *at any port or ports in or out of the way."*

In a handwritten clause the parties allowed "filling up" (meaning of cargo) "only in ports on the way westward of *(sic)* New York." This restriction does not apply to bunkering and clearly shows an intention that the vessel for bunkering purposes was to be allowed to stop at ports not on the customary or direct route.

There is no testimony as to the difference in distance between a direct voyage from Lisbon to New York and one via North Sydney. One witness testified that he thought a direct voyage from Gibraltar to New York was 300-400 miles shorter than one via North Sydney (R. 860); another witness thought a direct voyage from Gibraltar to New York was 500 miles shorter than one via North Sydney (R. 811). From measurements on the maps and from published tables of distances it appears that the difference between a direct voyage

from Lisbon to New York and one via North Sydney is much less than the above testimony would lead one to believe. The distance from Lisbon to New York (Reed's Tables 140) is 2905 miles; from Lisbon to Sydney 2260 miles; from Azores Islands to New York 2290 miles; from Azores Islands to Sydney 1645 miles (R. 142). Reed's Tables do not give the distance from Sydney to New York, but measurements on the Government charts show it to be approximately 807 miles. Consequently, the distance from Lisbon to New York via Sydney (North Sydney is for all intents and purposes the same) is 3067 miles as compared with a direct distance of 2905 miles or a difference of 162 miles. The same difference in distance exists between a voyage from the Azores Islands to New York direct (2290 miles) and from the Azores Islands to New York via North Sydney (2452 miles). This departure from the route is considerably less than the departures which under similar clauses were held not to be deviations in *The Blandon* and *The Panola.*

The words of Learned Hand, *D. J.* (now *C. J.),* in *The Blandon,* 287 Fed. 725, in considering a similar clause are appropriate:

> "True, it was not a stop on the customary route; at least, I must assume so on this record. Yet it was expressly agreed that the port might be 'out of the customary route.' What more limited sense can those words mean than a stop at a place some thirty hours away?"

To hold that the "Willdomino" was not privileged to go to North Sydney for bunkers is to give no effect to the liberty clauses contained in the bills of lading and to write a different contract for the parties.

When a bill of lading has expressed the liberties of a ship in as plain terms as are used here, the rules for the interpretation of contracts hardly permit that they be set

aside and a different contract imposed upon the parties. If a vessel on a voyage from New York to Liverpool, with such liberties as we have here, should abuse her liberties to the extent of stopping at Rio Janeiro, there might be ground upon which a Court would hold that such a divergence from the customary route was out of all reason and could not have been within the contemplation of the parties. But except in a case of a quite unreasonable divergence from the customary route, we submit that the parties must be allowed to make their own contracts and that the Courts should interpret them in accordance with their plain language.

(b) *The liberties of the bills of lading gave the* "WILLDOMINO" *the right (had she desired so to do) to take sufficient bunkers at North Sydney to get away from New York, as well as to get there.*

The Circuit Court of Appeals held that the "WILLDOMINO" went to North Sydney with the intention of obtaining not only sufficient bunkers to take her to New York, but also sufficient to enable her to make her next voyage from New York, and that this was a deviation, citing, *Austrian Union S. S. Co. v. Calafiore,* 194 Fed. 377 (C. C. A. 5). That case is not in point. The ship at a port off the route loaded cargo for a subsequent voyage and not bunkers.

The reasons for holding that it is a deviation for a vessel to stop at a port off the route on a voyage and take on cargo for a subsequent voyage do not apply to taking on bunkers there for a subsequent voyage.

In a recent English case on deviation, *U. S. Shipping Board v. Bunge & Born, Ltd.,* 41 T. L. R. 73, the Court of Appeal touched upon this point. The vessel (a fuel oil burner) had been chartered to carry maize from Buenos Aires to Malaga and Seville with a limited liberty clause which the Court held allowed her to call at ports on the usual route between these ports. After discharging her

Malaga cargo she had sufficient fuel oil to make Seville and discharge, but not enough to get away from Seville. It appeared that it was difficult to get fuel oil in Seville. She therefore stopped at Gibraltar, which was on the route to Seville, hoping to get fuel oil from an oil tanker there, but the tanker had not arrived, and after two days' waiting, she went to Lisbon, 300 miles off her course, and procured the oil. It was *held* that she was entitled to stop at Gibraltar for fuel oil, but that she should have waited for it there and that going to Lisbon was, therefore, a deviation.

Bankes, *L. J.*, said: "The master was, in my opinion, within his rights in calling at Gibraltar for fuel oil, as I consider that the liberty to call for bunkers must include the right to call for sufficient fuel to enable the vessel to get away from Seville as well as to get there."

Atkins, *L. J.*, was of the opinion that this question was not before the Court for decision.

Unless this rule stated by Bankes, *L. J., supra,* is correct, it is difficult to see how modern ocean commerce can be carried on. In the usual voyage of a vessel (especially a tramp) calling at several ports for loading and discharging, there is no clear point of demarcation where one can say that one voyage ends and another begins. Must she wait until she has discharged her entire inbound cargo before taking fuel or cargo for her outward voyage? Suppose she has loaded cargo in Hamburg for New York, Boston and Philadelphia, a common service today. She arrives in Philadelphia from Hamburg and discharges her inward cargo and at the same time loads outward cargo for Hamburg and bunker coal for her next round trip; she then goes to New York, where she discharges her inward cargo and loads cargo for Hamburg; she then sails to Boston, where she discharges her inward cargo from Hamburg and loads outward cargo, after which she sails for Hamburg. This is a common practice with many ships making regular calls at Atlantic ports. In such circumstances, would the loading at Philadelphia of cargo for Hamburg

and bunker coal for her round trip be a deviation as to the inward cargo from Hamburg for New York and Boston still aboard the vessel? And would the loading at New York of outward cargo for Hamburg be a deviation as to the inward cargo to be discharged at Boston and still remaining in the ship? If this doctrine of the Circuit Court of Appeals be correct, then this common maritime practice we have outlined is a deviation, no matter how broad may be the liberty clauses in the bills of lading, for as to inward Boston cargo the voyage did not end until such cargo was discharged at Boston, and the loading of outward cargo and bunkers at Philadelphia and New York would be for another voyage.

The rule of the Circuit Court of Appeals on this point in the present case is, we submit, entirely technical and based upon faulty reasoning and disregard of common sea practices. If approved it will embarrass commerce, add to the burden upon shipping and lead to the increase of ocean freight rates. Is it wise for courts to interfere with such common business practices?

(c) *The finding of the Circuit Court of Appeals that the "Willdomino" put into North Sydney for bunkers for a subsequent voyage was not raised before the Trial Court and was contrary to the only direct evidence on the point.*

Neither of the libels averred deviation (R. 3-5; 25-27). Libellants' answers to claimant's interrogatories did not specify deviation as a fault (R. 15, 16, 38, 39).

At the oral argument following the close of the testimony, counsel for the libellants submitted twenty-seven "Points of Negligence" upon which he relied and which he argued that he had sustained. They are set forth in the opinion of the trial court (R. 1369-1373). None of them suggested that the vessel went to North Sydney for bunkers for a voyage to be begun after the cargo had been

discharged in New York. That point was neither raised nor argued in the trial court. It was an afterthought. No evidence was taken upon it on either side, except that petitioner's president was asked on cross-examination if the vessel had not gone to North Sydney for bunkers for a subsequent voyage. He answered that she had not (R. 862).

The point was first raised in respondents' Petitions of Appeal (R. 1395, Sections 19 and 20; 1407, Sections 18 and 19). It was therefore not properly before the Circuit Court of Appeals for decision. *Badger v. Ranlett*, 106 U. S. 255, 259; *The Minnie*, 225 Fed. 36; *Jova Brick Works, Inc. v. City of New York*, 277 Fed. 180; *The Lydia*, 1 Fed. (2d) 18, 23.

Petitioner filed a petition in the Circuit Court of Appeals for a rehearing, calling attention to the above facts and asked leave to file an affidavit or to take the testimony of Mr. Hensley, the Halifax agent of the vessel, "to prove that he was directed by the owner in advance of the arrival of the ship at Sydney to order only bunkers for the voyage to New York, and that these orders remained unchanged. Further, that while he made every effort to procure at Sydney enough bunkers for New York, he was able (by reason of a coal strike at Sydney) to procure only enough coal (sixty-two and one-half tons) for Halifax" (R. 1453). Mr. Hensley's testimony on depositions on other points had been produced at the trial; but he was not examined by either side on this point because it had not been raised.

The Circuit Court of Appeals denied the motion to take the testimony, saying:

> "Should such testimony be received and given its greatest effect it would fail to negative that it was the purpose of the owner, or the master in obedience to the cablegram received by him at Gibraltar, to order additional bunkers after the vessel arrived at Sydney. It would not in our opinion be adequate to overcome the evidence in the cause that such was the primary purpose for which the vessel put in at Sydney. Con-

sequently, we think that neither affidavit nor testimony of Mr. Hensley, if taken, would serve any useful purpose" (R. 1459).

From the above quotation from the opinion of the Circuit Court of Appeals it might be inferred that there was direct evidence in the case showing that the primary purpose of the vessel in putting into North Sydney was to obtain bunkers for a subsequent voyage. There was no such direct evidence. This finding was on circumstantial evidence and upon inferences unsupported by any direct evidence. The opinion states: "*It is true that there is no direct evidence* that it was the purpose to obtain at Sydney coal for a subsequent voyage, but such fact may be established by circumstantial evidence as well as by direct evidence" (R. 1439).

The only direct evidence in the record entirely contradicts the finding that the vessel went to North Sydney for subsequent bunkers. Respondents' counsel on cross-examination of George T. Williams, petitioner's president, asked a few questions regarding the purpose for which the "WILLDOMINO" went to North Sydney, and his answers thereto constitute the sole direct evidence on this issue. This testimony is so directly in conflict with this finding of the Circuit Court of Appeals that we set it forth in full:

Cross-examination (R. 71):

"Q. But did you give your master standing orders to coal at Sydney?

A. I don't know as he had standing orders. We have made it a sort of practice to coal at North Sydney; as I recall it, along about that period we were having great difficulty in getting ship's bunkers on the Atlantic Coast of the United States, as you know in those days there were many embargoes on coal, and so on.

Q. Well, did the master of the 'WILLDOMINO' have orders to coal this vessel at Sydney?

A. You mean on this particular voyage?

Q. Yes.

A. I don't know; he might have had; you mean at the time of leaving Lisbon?

THE COURT: If you don't know, why just say so.

Q. Why were you hesitating about that answer?

A. Well, I am hesitating as to whether it was when he was at Lisbon or at Ponta Delgada.

Q. When he was at Ponta Delgada, did he have orders to coal at Sydney?

A. I think he naturally would have had orders to coal at the nearest coaling port, which would have been North Sydney."

Recalled; cross-examination (R. 234):

"Q. How big were the bunkers of the 'WILLDOMINO,' and how much coal would she take?

A. Permanent bunkers about 650 tons and reserve bunker in her bridge deck about 802 tons.

Q. So she could carry about 1400 tons of coal?

A. 1450.

Q. Did you anticipate that when the vessel sailed from Ponta Delgada that she would go to Sydney and there take on approximately 1400 tons of coal?

A. No. We may have given him orders to proceed to the nearest coal port, which would have been North Sydney from Ponta Delgada.

Q. If he could have gotten it there, was it the duty of the master when he got to Sydney to fill up his bunkers with coal there?

MR. SPRAGUE: I object to that question as to what the duty of the master was.

THE COURT: I will permit it.

A. It might be considered his duty, but since we were able to get in touch with North Sydney we would have given the instructions."

Recalled; cross-examination (R. 862):

"Q. When you sent this cable to your master directing him to go to Sydney, didn't you intend that he should at North Sydney take on bunkers for the return trip to Europe?

A. No, sir. We hadn't any voyage fixed.

Q. Well, for the next trip that this vessel should make to sea?

A. No, sir.

Q. You didn't intend that he should take on enough coal to go to sea again?

A. No, sir, hadn't any next voyage in mind.

Q. Did you intend that he should take on enough coal at North Sydney to coal some other ship of yours from an Atlantic port to sail?

A. No, sir.

Q. Now, that is exactly what the 'WILLDOMINO' had done on the preceding trip, wasn't it?

A. After we arrived at North Sydney, we did that, yes.

Q. On the preceding trip of the 'WILLDOMINO' you had her coal in North Sydney?

A. Yes, sir.

Q. For her requirements to get to New York and then sail again?

A. No, to transfer coal to some other British steamers.

Q. That you owned?

A. That we owned.

Q. Now, then on that other trip that the 'WILLDOMINO' stopped at North Sydney, she was coming from the Baltic Sea, wasn't she?

A. No, sir.

Q. Where was she coming from?

A. St. Nazaire, France.

Q. That is considerably further north than Lisbon, isn't it, that port?

A. Yes.

Q. St. Nazaire was the last place that this vessel stopped in Europe on the preceding trip?

A. It is where she discharged her cargo and sailed for North Sydney under ballast.

Q. Then she wasn't in danger to any other cargo on that preceding trip when she stopped at Sydney for coal, was she?

A. No, sir.

Q. No other cargo to be injured?

A. No cargo aboard of her.

Q. Is that the only other time the 'WILLDOMINO'

stopped at North Sydney while under your management and before this accident?

A. I think so."

The above testimony was given orally before the trial judge. Under the practice, his finding of a fact from oral testimony taken before him is of persuasive weight and ought, we submit, to be accepted by this Court.

There was no doubt in his mind as to the truthfulness and force of this testimony, for he held that the vessel was justified in putting into North Sydney and that this was not a deviation.

(d) *The finding of the Circuit Court of Appeals that the "Willdomino" went to North Sydney for bunkers for a subsequent voyage is contrary to the rules regarding the effect to be given to circumstantial evidence.*

The Circuit Court of Appeals based its finding on this point upon the cable of the owners to the master of the "WILLDOMINO" at Gibraltar; the failure of the officers to take on board at Gibraltar, Lisbon and Ponta Delgada, sufficient fuel for the voyage to New York; the clearance of the vessel at Lisbon and Ponta Delgada for New York; and the headings on the pages of the log books at Lisbon and of the engineer's log book at Ponta Delgada that the vessel was proceeding "towards" or "to" New York (R. 1439).

The cable received by the master from the owners at Gibraltar reads as follows (R. 1090):

> "Your coal requirements excessive cost of bunkers Gibraltar very high make accurate measurement remaining bunkers if not enough to make North Sydney take only enough to reach there cut down consumption in every way if fuel runs short reaching coast cut out one boiler."

The fact of this cable and the officers' failure at Gibraltar, Lisbon and Ponta Delgada to take sufficient coal for New York "permit no inference" said the Circuit Court of Appeals "other than that it was the intention of the claimant and of the master to have the vessel put in at Sydney. That it was their purpose to conceal this intent and to put into Sydney as a port of refuge (though under a necessity created by themselves) is shown by the vessel's clearing at Lisbon for New York, the statements of the log books that she was proceeding on a voyage to New York . . . " (R. 1439). The opinion then continued: " . . . it is unreasonable to ask one to believe that the purpose of this plan and of the stop at Sydney was merely to obtain a proper amount of coal to complete the voyage to New York, . . . "

This conclusion was reached by the Court from mathematical calculations taken from respondents' brief to this effect: If the ship had procured high-priced coal at Gibraltar or Ponta Delgada for a voyage to North Sydney and had gone to North Sydney where she could buy low-priced coal for New York, it would have cost $3600 more (counting in loss of time of vessel etc.) than to buy high-priced coal at Gibraltar or Ponta Delgada and go direct to New York.

But by buying at North Sydney all the low-priced coal she could load in her bunkers including coal for a subsequent voyage, the saving would have been $8200.

The court, upon these calculations, found that the captain had yielded to this seductive opportunity for profit and formed a concealed intent to go to North Sydney and fill up his bunkers there for a subsequent voyage.

The reasoning of the Circuit Court of Appeals (R. 1439), appears to us to be specious and we repeat that the only *direct* evidence in the case on that issue was that of the owner (quoted above) in which he denied that his purpose in sending the ship to North Sydney was to obtain bunker coal for a subsequent voyage. In fact, the ship bought no coal at North Sydney for a subsequent voyage. It is diffi-

cult to see how the court, upon the evidence, could have found that the ship went there for subsequent bunkers and therefore was guilty of a deviation which displaced the bill of lading.

The fallacy of this reasoning is that it piles inference on inference and the conclusion arrived at is no more than conjecture.

In *U. S. v. Ross*, 92 U. S. 281, 282, 283, a judgment of the Court of Claims for the plaintiff under the Captured Property Act was reversed, the opinion saying:

> "No connection between the cotton captured and the fund now held by the United States has been established. Certain facts have been found, and from them it was inferred, as a matter of law, that other facts existed; and upon the facts thus inferred the court gave judgment. We think that in this there was error. . . . These seem to us to be nothing more than conjectures. They are not legitimate inferences, even to establish a fact; much less are they presumptions of law. They are inferences from inferences; presumptions resting on the basis of another presumption. Such a mode of arriving at a conclusion of fact is generally, if not universally, inadmissible. No inference of fact or of law is reliable drawn from premises which are uncertain. Whenever circumstantial evidence is relied upon to prove a fact the circumstances must be proved and not themselves presumed."

The burden of proving deviation was on the respondents. As was said in *U. S. Fidelity & Guaranty Co. v. Des Moines National Bank*, 145 Fed. 273, 279:

> "Which theory was correct was left to mere conjecture. The bank had the burden of proof, and as it failed to produce any evidence reasonably tending to establish the latter theory to the exclusion of the

other, the guaranty company was entitled to a directed verdict in its favor. . . . As was well said by the Supreme Court of Iowa in *Asbach v. Chicago, etc. Ry. Co.*, 'A theory cannot be said to be established by circumstantial evidence, even in a civil action, unless the facts relied upon are of such a nature, and are so related to each other, that it is the only conclusion that can fairly or reasonably be drawn from them. It is not sufficient that they be consistent merely with that theory, for that may be true and yet they may have no tendency to prove the theory.' "

In *Midland Valley R. Co. v. Fulgham*, 181 Fed. 91, 95, the Circuit Court of Appeals for the Eighth Circuit said in a much quoted opinion: "Conjecture is an unsound and unjust foundation for a verdict. Juries may not legally guess the money or property of one litigant to another."

All that the owner and the master did was entirely consistent with sincerity. If so, doubt should not be thrown on their actions nor a circuitous and dishonest course of conduct attributed to them unless actual facts so require. There is no evidence in this Record to justify the Circuit Court of Appeals in accusing them of acts of dishonesty which, if committed, would have been a fraud on the cargo owners (R. 1439).

Contrary inferences might as easily (and more fairly) have been drawn *which would have coincided with the only direct evidence in the case* and with the presumption of honesty.

The reason why sufficient coal for New York was not taken on at Gibraltar, Lisbon or Ponta Delgada was because the vessel's stage of her voyage (under her liberties) was from Lisbon and from Ponta Delgada to North Sydney, for which stage she had ample coal.

The fact that the entries at the tops of the pages of the logs made upon leaving Lisbon state that the vessel was

proceeding "to" or "towards" New York (R. 1010, 1203), may have been due either to carelessness on the part of the officers and engineers who made these entries, or to the fact that New York was the ultimate destination to which all the cargo was being transported. It is not evidence.

The deck log (the only important log in this connection) on the day the ship left Ponta Delgada shows "From Ponta Delgada to Sydney" (R. 1034) and so till she arrived there.

It may well be doubted whether the serious issues in this cause can be decided by the variant headings at the top of the log books in the teeth of the direct cable order of the owners to proceed to North Sydney.

The fact that the vessel at Lisbon and Ponta Delgada "cleared" for New York cannot be taken to prove an intention of the master to conceal the fact that he expected to stop at North Sydney for bunker coal. No such inference should be drawn therefrom. All her cargo was destined to New York and that was the port to which she would properly be cleared. Clearance is a practice connected with the customs authorities, who are concerned only in the vessel's having satisfied the requirements as to customs duties, harbor dues and the like.

> "In the absence of statute, clearance is but the gracious permission of the sovereign to depart from a port into which, without like permission implied from an 'entry' there was no right to come." *International Mercantile Marine Co. v. Stranahan,* 155 Fed. 428, 432.

There is no proof in the record of any statutory requirements of Portugal as to clearance. In the United States, clearance is regulated by statute. (1 Stat. 698, 699, and 3 Stat. 542; R. S. Par. 4197-4201; Comp. Stat. 7789-7793), which refer entirely to the manifesting of the cargo, the payment of duties thereon, and the ports to which such cargo is consigned. This shows that the purpose of clearance requirements is to prevent breaches of neutrality and

violation of the customs. In discussing these sections of the statutes, the Circuit Court of Appeals for the Second Circuit in *Hamburg American Steam Packet Co. v. U. S.*, 250 Fed. 747, 761, said:

> "It appears also that the master and shippers must state 'the foreign port or country in which *such cargo is truly intended to be landed*' while the clearance simply states that the vessel is 'bound for . . .' which is to be understood as the 'port or place' named in the master's oath, or, the 'foreign port or country *in which such cargo is truly intended to be landed.*' "

If the clearance practice in Portugal is similar to that of the United States, then the clearance of the "Willdomino" for New York was perfectly in order even though the master at the time intended to put into North Sydney for bunkers. The cargo was all destined for New York. The vessel would not be required to enter or clear at the custom house at North Sydney if she merely took bunker coal there. There was no necessity for her clearing at Lisbon and Ponta Delgada for that port. Clearance for New York showed no intent to conceal a purpose to bunker at North Sydney for a subsequent voyage.

Here again we submit that the Circuit Court of Appeals was merely drawing inferences from insufficient facts.

(e) *Admitting for the purpose of the argument only that the "Willdomino" sailed from Lisbon and Ponta Delgada with the intention of putting into North Sydney to procure bunkers for a subsequent voyage, nevertheless that was not a deviation, the intention never having been executed.*

The Circuit Court of Appeals, while admitting that the "Willdomino" did not in fact take bunker coal at North Sydney for a subsequent voyage, held that this was immaterial as it was the petitioner's *intention* to take such bunkers there and that the intention governed. In this there

was error. We submit that in so holding, it has confused the doctrine of deviation with that of abandonment of an intended voyage. In marine insurance, where the *terminus ad quem* has been definitely given up and another port of discharge selected, the underwriter is relieved from liability from the moment the purpose of abandoning the *terminus ad quem* is formed (*Arnould Marine Insurance*, (10th ed.) Sec. 380, p. 530). But if "the *terminus ad quem* specified in the policy remains the ultimate place of intended destination" the putting into another port not allowed by the policy before going to the ultimate place of destination is not an abandonment but a deviation (*ib.*, Sec. 382, p. 532) in which event the "mere intention to deviate, never executed, is not sufficient" to relieve the underwriter (*ib.*, Sec. 378, 527; Sec. 381, p. 531). The distinction between the two terms is defined by Chancellor Kent in *New York Firemen Ins. Co. v. Lawrence*, 14 Johns. Rep. 46, 57;

> "Deviation is not a change of the voyage, but of the proper and usual course in performing it. The voyage insured is never lost sight of in cases of deviation, actual or intended . . . But if the original place of destination be abandoned, in order to go to another port of discharge, the voyage itself becomes changed, because one of the termini of the original voyage is changed. The identity of the voyage is gone, and a new and distinct voyage is substituted."

The case at bar is in no sense one of abandonment. New York was always the actual port of ultimate destination. Stopping at North Sydney without a proper liberty clause in the bill of lading would have been a deviation, and not an abandonment. Even if there had been an intention to stop at North Sydney (without the right to do so) for subsequent bunkers (which we do not admit), yet, if the intention was not carried out, there was no deviation. Whether or not there was a deviation must be decided by what was actually done and is not a question of intention. There are numerous authorities to this effect. We cite only:

Marine Ins. Co. v. Tucker, 3 Cranch 357, 393; *Coffin v. Newburyport Marine Ins. Co.,* 9 Mass. 436, 447, where it is said:

"A deviation is a voluntary departure, without necessity or reasonable cause, from the regular and usual course of the voyage insured. This discharges the underwriters *from the time of the deviation. . . . But an intention to deviate, however deliberately formed, is not a deviation.*" (The italics are in the Report.)

Where a vessel enters a port for a lawful purpose, and while there also accomplishes another purpose which would have constituted a deviation had she entered for that purpose alone, there is no deviation provided the unlawful occupation does not detain her for a period longer than she is entitled to remain in order to fulfill her lawful purpose, since the risk is not thereby varied.

Hughes v. Union Ins. Co., 3 Wheat. 159, 163.

Here a policy of marine insurance gave liberty to touch at Matanzas to find out if there were "any men of war off the Havana." The voyage was from Teneriffe to the Havana to Baltimore. The vessel put into Matanzas to avoid enemy cruisers and while necessarily delayed there unloaded certain cargo. As soon as the passage was clear she sailed for the Havana and on the return voyage to Baltimore was lost. The underwriters claimed that the discharge at Matanzas constituted a deviation. Chief Justice Marshall, delivered the opinion of the Court holding that there was no deviation. He said:

"And why is it a deviation? It produced no delay, no increase of risk, and did not alter the voyage. The vessel pursued precisely the course marked out for her in the policy."

We submit that the Circuit Court of Appeals erred in finding a deviation.

POINT III.

Admitting for the purpose of the argument (but not otherwise) that the ship was unseaworthy upon sailing from Lisbon and from Ponta Delgada because of an insufficient coal supply, and that the stranding was the result of faults or errors in navigation, yet, since there was no causal relation between such unseaworthiness and the stranding which caused the damage to respondent's cargo, neither the ship nor the shipowner was by such unseaworthiness deprived of the protection of the Harter Act.

Let it be admitted for the purpose of this argument but not otherwise, that the "WILLDOMINO" was unseaworthy upon sailing from Lisbon and from Ponta Delgada because of insufficient coal, and that her owners did not exercise due diligence to make her seaworthy and properly manned, equipped and supplied in that respect. We shall proceed to show that on the proper interpretation of the Harter Act, upon principle and upon authorities, a causal relation must be shown between the unseaworthiness and the disaster which caused the damage to cargo, and that in the absence of such showing, the shipowner is still entitled to the protection of the Harter Act, Section 3.

This exact question has not been decided by this Court.

It was not really discussed by the Circuit Court of Appeals in its opinion. It merely cited these cases (R. 1429; 300 Fed. 10); *The Wildcroft*, 201 U. S. 378; *The Southwark*, 191 U. S. 1, and *International Navigation Co. v. Farr & Bailey Manfg. Co.*, 181 U. S. 218, 226, and added:

> "It follows, we think, that if the carrier fails to meet that burden he is liable for damage to the cargo resulting from negligence of the master and crew in the navigation or management of the vessel, and the carrier is so liable wholly without regard to whether or not there was any causal connection between the

lack of due diligence to make the ship seaworthy in all respects and the loss caused by the negligence in navigation or in the management of the vessel."

No one of the three cases cited by the Circuit Court of Appeals sustains a finding that a causal connection need not be shown. In no one of them could the question have even arisen. Thus:

International Navigation Co. v. Farr & Bailey Mfg. Co., 181 U. S. 218.

Here the damage to the cargo was caused by an open port. It was held in all three of the courts that the port had been left open at sailing, or else was either not fastened at sailing, or unsecurely fastened, and that the vessel was, therefore, unseaworthy at sailing.

The unseaworthiness was the direct cause of the damage and no question of a causal relation could have been raised on the facts.

The Southwark, 191 U. S. 1.

This case is to the same effect. The libellant's shipment of dressed beef was injured because the ship's refrigerating apparatus was out of repair at the time of sailing. Both the District Court and the Circuit Court of Appeals exonerated the vessel from fault. This court reversed the decrees below and directed a decree in favor of the libellant. The unseaworthiness was the direct cause of the damage.

The case is not relevant to the case at bar.

The Wildcroft, 201 U. S. 378.

This was a cargo of sugar which was damaged after the ship arrived at the dock in Philadelphia, and while the cargo was being discharged. This Court found that the ship was seaworthy at the beginning of the voyage and exonerated her. This case appears not to be relevant.

That a causal relation between the unseaworthiness and the disaster must be shown was decided in

The Turret Crown, 282 Fed. 354, 359, 360.

In this case, which came up in the District Court for the Southern District of New York, Ward, *C. J.*, found that the vessel when she sailed was unseaworthy in respect of her steering gear and that the owners had knowledge of it, but he also found that this had not contributed to the bottom damage which had caused the injury to the cargo and that therefore there was no causal relation between the unseaworthiness and the damage to the cargo. The libel of the cargo owners was dismissed. In his opinion, he said:

> "But the question is whether this unseaworthiness, whose defects were fully developed before water got into the fuel tanks, *contributed to the bottom damage which injured the cargo.* Of course, after the fuel oil gave out, the steering gear, even if perfect, would have been of no possible consequence. The deck log continuously describes the behavior of the steamer in the sea down to the time when she turned back as 'rolling heavily.' Rolling does not imply the pitching which causes bottom damage. Even if the vessel fell off so far as to be in the trough of the sea, there would be no pounding. It seems to me that the breaking down of the steering gear, instead of increasing, decreased the strain upon the vessel (p. 359).
>
> . . . . . .
>
> "If forcing the steamer into the sea, whether a head sea or a following sea, at a speed sufficient to give steerageway, did contribute to the bottom damage, it was an error in navigation and management of the vessel, for which the claimant is excused by the Harter Act" (p. 360).

The Circuit Court of Appeals for the Second Circuit in *The Turret Crown* (297 Fed. 766; 1924 A. M. C. 253), reversed the District Court *on the facts,* finding that the

damages to the double bottom tanks of the vessel in which its fuel oil was stored and which caused its return to port were caused by the added strain resulting from its defective steering gear and that this defect had existed at the commencement of the voyage and had made the vessel unseaworthy at sailing. It was, therefore, unnecessary for the Court to pass upon the question of a causal connection. It found it as a fact.

We quote from the opinion at pages 773 of the *Federal Reporter* and 261 of the *Amer. Mar. Cas.*:

> "We are satisfied that the defects in the steering gear added to the strains on the vessel as qualified experts declared. The proximate cause of the distress of the ship which ultimately required her to return to port was the defective condition of the steering gear. The failure of the steering gear and inability to control the vessel produced a wrenching and straining and pounding of the vessel which in turn resulted in damage to the tanks. It was an unseaworthy condition of the vessel."

And at pages 774 of the *Federal Reporter* and 263 of *Amer. Mar. Cas.*:

> "The defects in the steering gear were fully developed before there was any trouble with the vessel's fuel tanks. The trouble with the fuel tanks arose some twenty-four hours after the steering gear had developed serious defects and prevented the vessel from being properly steered and required her to stop. . . .
>
> "In the view we take of the evidence, the conclusion is iresistible that the damage to the double bottom tanks of the ship *was due to the added strains to which they were subjected by reason* of the defective steering gear. In this view of the case, the appellee is liable."

It will be observed that the statement of the law as to causal connection as laid down by Ward, *C. J.*, was in no sense overruled by the Circuit Court of Appeals.

The Turret Crown, 284 Fed. 439, 444.

The libel here was filed by another cargo owner in respect of the same voyage of *The Turret Crown* as in the case last cited. It came before the Circuit Court of Appeals for the Fourth Circuit, which affirmed a decree entered by Waddill, *J.*, in the District Court, dismissing the libel. In the opinion of the Court it was said:

> "Judge Ward, in the opinion filed by him in the New York case, a copy of which was submitted to us by both parties at the argument, held that the difficulties of navigation which the vessel encountered were due to a breakdown in her steering gear, and that this, in turn, was due to defective bolting of the steering engine, causing it to work loose on its foundation. He further found that these defects were discovered and pointed out in a survey held prior to the commencement of the voyage, and that the owners were negligent in failing to correct them. He likewise found, however, that the cause of the cargo damage was the water taken into the fuel tank through the bottom, and that this was not caused by the unseaworthiness of the vessel. If we accept, as we are disposed to do, his finding of the facts in this regard, it would seem to follow, of course, that, *there being no causal relation* between the unseaworthiness and the damage, no advantage may properly be taken of the former."

The application of the rule of causal relation to the common law doctrine of implied warranty of seaworthiness which prevailed in England and in the United States, was first made in the English courts in *The Europa* [1908] P. 84, in which the decision was based upon long established legal principles equally recognized in this country, and in the light of which the Harter Act should be interpreted.

That case was heard by Bucknill and Bargrave Deane, *J. J.*, in the Divisional Court of the Admiralty Division.

The lower Court had sustained the libel against the shipowner for damage to the cargo. In the Divisional Court, the appeal was allowed.

Bucknill, J.:

"The question raised on this appeal is a very important one, and we think the exact point has not yet been decided.

"It is whether a shipowner, whose ship was unseaworthy at the commencement of the chartered voyage, is liable in damages to the charterer, the owner of the cargo on board, not only for injury to his cargo, caused directly as the result of that unseaworthiness, but also for injury caused to other portions of the cargo, *not as the result of such unseaworthiness,* but by a peril of the sea excepted in the bill of lading; in other words, whether seaworthiness is a condition precedent in a charter of affreightment, to the extent that if the ship be unseaworthy the shipowner is reduced to the position of a common carrier and liable for all damage occasioned to the cargo, even if such damage be solely caused by an excepted peril and not by the unseaworthiness.

. . . . . .

"In our opinion there must be a time when the charterer or cargo-owner has no longer a right to treat the promise or warranty of the shipowner as a condition precedent, but must rely on his breach of warranty, and must then prove that the damage sued for has been caused by the unseaworthiness of the ship at the material time.

"In *Boone v. Eyre* (1777) 1 H. Bl. 273, note, Lord Mansfield said: 'Where mutual covenants go to the whole of the consideration on both sides, they are mutual conditions, the one precedent to the other. But where they go only to a part, where a breach may be paid for in damages, there the defendant has a remedy on his covenant, and shall not plead it as a condition precedent.' That was an action by the plaintiff, who had covenanted to convey to the defendant the equity of redemption of a plantation in the West Indies, together with the stock of negroes upon it, in consideration of £500 and an annuity of £160 for his life. The plaintiff covenanted that he had a good title to the plan-

tation and was lawfully possessed of the negroes, and that the defendant should quietly enjoy. The defendant covenanted that the plaintiff well and truly performing all and everything therein contained on his part to be performed, he, the defendant, would pay the annuity. Plea, that the plaintiff was not, at the time of making the deed, legally possessed of the negroes on the plantation, and so had not a good title to convey. Demurrer. Lord Mansfield, after laying down the law as above, added: 'If this plea were to be allowed, any one negro not being the property of the plaintiff would bar the action.' Judgment for plaintiff on the demurrer."

Bucknill, *J.*, also cited *Havelock v. Geddes* (1809) 10 East 555, 563, as follows:

"Lord Ellenborough, in giving judgment said: 'And to be sure, if this were a condition precedent the neglect of putting in a single nail for a single moment after the ship ought to have been made tight, staunch, etc., would be a breach of the condition, and a defense to the whole of plaintiff's demand.' "

The opinion proceeds:

"In *Steel v. State Line Steamship Co.*, 3 App. Cas. 72, 88, Lord Blackburn said: 'So here I think that if this failure to make the ship fit for the voyage, if she really was unfit, did exist, then *the loss produced immediately by that,* though itself a peril of the seas, which would have been excepted, is nevertheless a thing for which the shipowner is liable, unless by the terms of his contract he has provided against it.' The GLENFRUIN, 10 P. D. 103, 108, was cited during the arguments before us. There the defendants, the owners of cargo, were sought to be made liable for salvage services rendered to the GLENFRUIN, on which the defendants' cargo was being carried, the owners of the salving ship being also the owners of the salved ship. The salvage services were rendered because the GLENFRUIN's shaft broke during the voyage. The defence was that the GLENFRUIN was unseaworthy at the time

when she began her voyage, and that the bill of lading given for the defendants' cargo, which excepted accidents from machinery—her shaft broke at sea in fine weather—was, therefore, not binding on them, and that the plaintiffs, as owners of the salving and salved ships, were liable to the defendants for all damages and losses occasioned by the unseaworthiness of their ship, the GLENFRUIN, of which losses salvage was one. Butt, *J.*, said: 'I am of opinion that the exceptions in the bill of lading have not the effect either of limiting the implied warranty or of otherwise exempting the shipowner from liability to the owners of cargo for damage or loss occasioned by the breaking of the shaft,' and a little lower down on the same page he said that the exception in the bill of lading had no application to the case of a ship which was unseaworthy at the time of sailing, and *the unseaworthiness of which was the efficient cause of the loss or damage. Kopitoff v. Wilson,* 1 Q. B. D. 377, was an action by an owner of goods shipped on board the defendant's ship and which were lost whilst on a voyage from Hull to Cronstadt. The declaration alleged a breach of warranty of seaworthiness of the ship by the defendant, and that the goods were lost by reason of the breach, but it was not argued or suggested that if the goods *had not been lost in consequence of the unseaworthiness* the defendant would still have been liable, or that the bill of lading would not have applied. The two questions which were left by Blackburn, *J.*, to the jury were, first, whether the ship was seaworthy, and, secondly, whether, if she was not seaworthy, the goods were lost by her unseaworthiness. *Gilroy v. Price,* (1893) A. C. 56, was a decision on a question of fact, whether the respondents' ship was unseaworthy on sailing, and whether, if so, the bill of lading relieved them notwithstanding as to the goods which were damaged in consequence of such unseaworthiness; and it was held that, the ship being unseaworthy, the respondents lost the protection of the bill of lading as to the damage *so caused.*

"It appears to us, therefore, that whenever a cargo-owner has claimed damages from a shipowner for loss occasioned to his goods on the voyage, and the ship was in fact unseaworthy at the material time,

the cargo-owner has had to prove that the loss was occasioned through or in consequence of the unseaworthiness, and it has not been sufficient to say merely that the ship was unseaworthy, and therefore that he was entitled to recover the loss, although there was no relation between the unseaworthiness and the damage.

"... and in our judgment the plaintiffs are only entitled to recover from the defendants such damages as directly resulted from the want of seaworthiness and not for the damage caused by the water which got into the 'tween decks through the collision between the ship and the dock wall, which was covered by the excepted perils in the charter party, and to the protection of which the shipowner was still entitled, notwithstanding the unseaworthiness of the vessel.

"Appeal allowed with costs."

Kish v. Taylor (1912) A. C. 604 (H. of L.).

In this case *The Europa* was "followed and approved." The charterers had failed to furnish a full cargo of standards, the vessel being then seaworthy. The master, after this default, and in relief of the charterers, obtained additional cargo from other sources, but he overloaded his ship with deck cargo, and by reason of her overloaded condition she was obliged to take refuge in Halifax. Some of the deck cargo was carried overboard, other portions were jettisoned, and still other portions damaged, and the vessel herself was damaged. The cargo-owners claimed that as every shipowner is held to warrant his ship seaworthy, a breach of that warranty had put an end to the contract of affreightment in the bill of lading and consequently that, since the goods had been damaged, the indorsees of the bill of lading were only obliged to pay the shipowners for their services such sum as they might be entitled to receive instead of the remuneration stipulated for in the bill of lading.

The case was heard before Lord Loreburn, *L. C.*, Lord Macnaghten and Lord Atkinson.

"*Lord Atkinson:* Mr. Atkin, on behalf of respondents, was driven to admit that, if his contention on the first point were sound, it would be competent for every indorsee of a bill of lading, whose goods had, in fact, been carried safely and with due expedition to the appointed point of discharge, to contend that, by reason of some of those comparatively trifling omissions on the part of the master which have been held to render a vessel unseaworthy, such as sailing without two anchors, sailing without an adequate supply of medicines and medical appliances for the crew, he was released from all the obligations imposed upon him by the bill of lading, the argument being that the provision of a seaworthy ship was a condition precedent, and not having been performed the contract of affreightment was entirely displaced.

"No authorities were cited in support of this proposition. I think it is in conflict with the principles of English law."

The opinion proceeds:

"The case of *The Europa* (1908) P. 84, is, I think, an authority against the respondents' contention. There the action was brought by the charterer against the shipowner in respect of goods damaged by one of the perils of the sea excepted by the charter party, not by the unseaworthiness of the ship, which was admitted. It was held by Bucknill and Bargrave Deane, *JJ.*, on a line of reasoning which appears to me convincing, that the charter party, notwithstanding this unseaworthiness, was not displaced, that, on the contrary, the clause excepting perils of the sea was alive and operative, and that the shipowner, despite his breach of warranty, was protected under it from liability for the injury done to the goods.

"Neither in *Steel v. State Line Steamship Co.*, 3 App. Cas. 72, nor in *Gilroy, Son & Co. v. Price & Co.* (1893) A. C. 56, was it suggested that the breach of warranty of seaworthiness put an end to the contract of affreightment and relegated the shipowner to his rights as a common carrier by sea. On the contrary,

the observations of Lord Blackburn in the former case, printed at pages 88 and 91, of the report, seem to indicate that the indorsee of the bill of lading might be disentitled to recover, despite the fact of unseaworthiness, unless that unseaworthiness caused the damage. At p. 88 he used these words: 'So here I think that if this failure to make the ship fit for the voyage, if she really was unfit, did exist, then the loss produced immediately by that, though itself a peril of the seas which would have been excepted, is nevertheless a thing for which the shipowner is liable, unless by the terms of his contract he has provided against it'; and at p. 91 he says: 'I have no doubt what the result will be; it will be a question, taking the whole circumstances together, was this ship reasonably fit when she sailed to encounter the perils, and was the damage that happened a consequence of her being unfit, if she was unfit,' which appears to me to imply that if the damage was not a consequence of this unfitness, the shipowner's liability must be determined by the provision of his contract of affreightment, so far as it dealt with that liability.

"In *Baumvoll Manufactur von Scheibler v. Gilchrest & Co.*, (1892) 1 Q. B. 253, 257, Lord Esher is reported to have used these words: 'The first cause of action that they allege is for breach of bills of lading, and secondly, they allege negligence in sending the ship to sea from New Orleans in an unseaworthy condition. It is not sufficient breach of a bill of lading that the ship went to sea in an unseaworthy condition; but it must also be shewn that the unseaworthiness *was the cause of loss.*'"

In their brief filed in this court in opposition to the grant of writs of certiorari in these cases respondent's counsel referred to *Kish v. Taylor* and said that "it has been very greatly limited in the House of Lords in *Atlantic Shipping & Trading Co. v. Dreyfuss,* (1922) A. C. 250.

This is a mistake. *Kish v. Taylor* was not referred to in the opinion of the Court. The only question there was as to whether the right to sue had been lost because of an

arbitration agreement between the parties which contained a three months limitation.* It was said by the Court *arguendo:*

> "It is quite true that the fact of unseaworthiness does not destroy the contract of affreightment *in toto.* Such a doctrine would lead to absurd consequences."

The Europa and *Kish v. Taylor* were followed in the House of Lords in

> *Elder, Dempster & Co. v. Patterson* (1924) A. C. 522.

Here heavy bags of palm kernels were stowed on top of casks of palm oil and crushed them. The trial Judge sustained the libel, holding the chartered owner liable upon the ground of unseaworthiness in not having the hold properly equipped for stowage. The Court of Appeal refused an appeal. The House of Lords reversed the Court of Appeal and dismissed the action upon the ground that the damage was due to bad stowage, in respect of which the chartered owner was protected by the exceptions in the bill of lading.

Lord Sumner (p. 549):

> "Two things must therefore be shown: (1) that the ship was unseaworthy in the sense of the word established by the decisions and (2) that the damage complained of *was caused thereby* and would not have arisen but for that unseaworthiness. For my part I neither think that the alleged defects in the ship and her equipments amount in law to unseaworthiness, nor that the damage to the puncheons of oil was due to them. No structural defect in the GRELWEN caused this damage, nor was her equipment defective."

Viscount Finlay (p. 536), dissented on the ground that the interior arrangements of the ship were not suitable for

*It may be observed that the House of Lords, except in Peerage cases, can not depart from its own precedents. *Gray, Nature and Sources of the Law,* citing *London Street Tramways Co. v. County Council* (1898) A. C. 375.

the service she had undertaken, and that therefore the ship was unseaworthy, but he said:

> "For any loss or damage caused by the unseaworthiness the shipowner is liable, but the mere fact that the ship was unseaworthy does not make the shipowner liable *unless the loss was caused by the unseaworthiness: The Europa* (1908) P. 84; *Kish v. Taylor* (1912) A. C. 604.
>
> "Order of the Court of Appeal reversed, and action dismissed."

The International Movement for Uniformity of Bills of Lading.

Since those cases were decided, the British "Carriage of Goods by Sea Act, 1924," has been enacted, August, 1924. It followed, speaking broadly, the principles of the Harter Act. Canada in 1910, Australia in 1904 and New Zealand in 1908 had passed acts along the same lines. The British Act (Sec. 2) abrogated the common law rule that in every contract of carriage of goods by sea the shipowner (in the absence of an express stipulation) impliedly undertakes that his ship is seaworthy at sailing and fixed his responsibilities and liabilities by statute.

The act contains the following provision:

> "Sec. 2: There shall not be implied in any contract for the carriage of goods by sea to which the Rules apply any absolute undertaking by the carrier of the goods to provide a seaworthy ship."

The Rules are a part of the act:

> "Article III.—RESPONSIBILITIES AND LIABILITIES.
>
> "1. The carrier shall be bound, before and at the beginning of the voyage, to exercise due diligence to—
>
> "(a) Make the ship seaworthy;
>
> "(b) Properly man, equip and supply the ship;
>
> "(c) Make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation."

"Article IV.—Rights and Immunities.

"1. Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped and supplied, and to make the holds, refrigerating and cool chambers and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation in accordance with the provisions of Paragraph 1 of Article III.

"Whenever loss or damage has resulted from unseaworthiness, the burden of proving the exercise of due diligence shall be on the carrier or other person claiming exemption under this section.

"2. Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from—

"(a) Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship."

(Here follow sixteen other possible causes of loss or damage for which the carrier or ship are not responsible.)

The British Act follows the Hague Rules of 1921 and 1922. A Diplomatic Conference on Maritime Law was held at Brussels in October, 1922. It adopted the Hague Rules with slight modifications. See Scrutton, Charter Parties and Bills of Lading, 12th ed. 1925, App. iv.

The intent of Article IV, 1, quoted above, is clearly that the shipowner is not liable for loss or damage to cargo caused by neglect in navigation where the ship was not seaworthy at sailing or where there was lack of due diligence on the part of the carrier to make the ship seaworthy, unless a causal relation is shown between the unseaworthiness and the disaster. It embodies and enacts the rule in the three cases we have just cited, *The Europa, Kish v. Taylor,* and *Elder, Dempster & Co. v. Patterson.*

The interpretation for which we contend will bring the law in the United States into conformity with the law of Great Britain.

In *The Eliza Lines,* 199 U. S. 119, 128, Mr. Justice Holmes, in delivering the opinion of the Court, said:

> "Of course it is desirable, if there is no injustice, that the maritime law of this country and of England should agree."

So also in *Queen Ins. Co. v. Globe, etc., Fire Ins. Co.,* 263 U. S. 487, 493.

In no branch of the law is international uniformity more desirable than in maritime law. If the four great classes of maritime business are included—shipowners, shippers, underwriters and bankers—it concerns greater interests and capital than any other business. Its conduct is closely interwoven internationally. It may be said that every shipping transaction, certainly every large transaction, brings in or may bring in all four of those interests.

It is not necessary to dwell at length on the argument. It speaks for itself. Uniformity of law is one of the great questions of the times.

The Authorities on the Interpretation of Statutes.

United States v. Kirby, 7 Wall. 482, 486.

> "All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language, which would avoid results of this character. The reason of the law in such cases should prevail over its letter."

The reference in this opinion to a law of Bologna and one of England in 1 Edward II, are too familiar to require quotation.

Hawaii v. Mankichi, 190 U. S. 197, 214.

Here Mr. Justice Brown cites *Lau Ow Bew v. United States,* 144 U. S. 47, 59, and quotes from the opinion of the Chief Justice:

> "Said the Chief Justice: 'Nothing is better settled than that statutes should receive a sensible construction, such as will effectuate the legislative intention, and, if possible, so as to avoid an unjust or an absurd conclusion.' "

The opinion proceeds:

> "Two recent English cases are instructive in this connection: In *Plumstead Board of Works v. Spackman,* L. R. 13 Q. B. D. 878, 887, it was said by the Master of Rolls, afterwards Lord Esher: 'If there are no means of avoiding such an interpretation of the statute,' (as will amount to a great hardship), 'a judge must come to the conclusion that the legislature by inadvertence has committed an act of legislative injustice; but to my mind a judge ought to struggle with all the intellect that he has, and with all the vigor of mind that he has, against such an interpretation of an act of Parliament; and, unless he is forced to come to a contrary conclusion, he ought to assume that it is impossible that the legislature could have so intended.' See also *Ex parte Walton,* L. R. 17 Ch. D. 746."

Jacobson v. Massachusetts, 197 U. S. 11, 39.

> "All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression or absurd consequence."

Church of the Holy Trinity v. United States. 143 U. S. 457, 459.

Here the Immigration Act (23 Stat. 332) made it unlawful for any person "to prepay the transportation . . . of any alien . . . under contract . . . to perform labor or service of any kind in the United States." The Circuit

Court for the Second Circuit had held that the contract between the Church and an English clergyman to come to New York and act as its rector was within the prohibition of the statute. Its decision was reversed. The opinion of the Court, after pointing out the very broad and inclusive language of the statute upon which the lower Court had based its conclusions, said:

> "While there is great force to this reasoning, we cannot think Congress intended to denounce with penalties a transaction like that in the present case. It is a familiar rule, that a thing may be within the letter of the statute, and yet not within the statute, because not within its spirit, nor within the intention of its makers. This has been often asserted, and the reports are full of cases illustrating its application. This is not the substitution of the will of the judge for that of the legislator, for frequently words of a general meaning are used in a statute, words broad enough to include an act in question, and yet a consideration of the whole legislation, or of the circumstances surrounding its enactment, or the absurd results which follow from giving such broad meaning to the words, makes it unreasonable to believe that the legislator intended to include the particular act."

We shall point out below the "absurd results" which will follow upon the interpretation of the Harter Act adopted by the Circuit Court of Appeals—that no causal relation need be shown between the unseaworthiness and the disaster. We argue that, under the above rules of interpretation, the rule of causal relation can be laid down, because it is not inconsistent with the act, because there is a *casus omissus* in the act, and because it is unreasonable to believe that the legislature intended the "absurd results" which would follow if the act be so interpreted.

We need not ask the court to go as far as it went in the Trinity Church case. It cannot be said here that there are "words of a general meaning" (as said in that case) which, taken in their ordinary sense, would exclude the causal relation rule. It is, rather, a *casus omissus*.

Before considering these "absurd results," something should be said about the history and purpose of the Harter Act.

*The Harter Act—Its History and Purpose.**

The Irrawaddy, 171 U. S. 187, 192.

> "Plainly the main purposes of the act were to relieve the ship owner from liability for latent defects, not discoverable by the utmost care and diligence, and, in event that he has exercised due diligence to make his vessel seaworthy, to exempt him and the ship from responsibility for damage or loss resulting from faults or errors in navigation or in the management of the vessel."

The opinion then points out that as the law stood before the passage of the act a shipowner could not contract against his liability for loss occasioned by negligence or fault because such a contract "was held by the Federal Courts to be contrary to public policy, and, in this particular, the owners of American vessels were at a disadvantage as compared with the owners of foreign vessels, who can contract with shippers against any liability for negligence or fault on the part of the officers and crew. This inequality, of course, operated unfavorably on the American shipowner, and Congress thought fit to remove the disadvantage, not by declaring that it should be competent for the owners of vessels to exempt themselves from liability for

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*The entire text is in the Appendix. Section 3 is as follows:

"Sec. 3. That if the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent, or charterers, shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel nor shall the vessel, her owner or owners, charterers, agent, or master be held liable for losses arising from dangers of the sea or other navigable waters, acts of God, or public enemies, or the inherent defect, quality, or vice of the thing carried, or from insufficiency of package, or seizure under legal process, or for loss resulting from any act or omission of the shipper or owner of the goods, his agent or representative, or from saving or attempting to save life or property at sea, or from any deviation in rendering such service."

the faults of the master and crew by stipulations to that effect contained in bills of lading, but by enacting that, if the owners exercised due diligence in making their ships seaworthy and in duly manning and equipping them, there should be no liability for the navigation and management of the ships, however faulty."

The Southwark, 191 U. S. 1, 16.

> "The Harter Act, as we understand it, relieves carriers from some of the harsher rules of obligation in force before its passage, but this relief is conditioned upon the discharge of the carrier's duty to use due diligence to provide that which it holds out to the shipper it is competent to furnish, a seaworthy vessel, duly equipped and provided for the purposes of the voyage."

The Jason, 225 U. S. 32, 51.

Here the gist of the act is expressed by Mr. Justice Pitney in rendering the opinion of the Court as follows:

> "Congress says to the shipowner—'In certain respects you shall not be relieved from the responsibilities incident to your public occupation as a common carrier, although the cargo owners agree that you shall be relieved; in certain other respects (provided you fulfill conditions specified) you shall be relieved from responsibilty, even without a stipulation from the owners of cargo.'"

The Act Should Be So Construed As to Include the Rule of Causal Relation Between the Unseaworthiness and the Disaster Causing Cargo Damage.

Let us point out that the owner of a vessel in making his ship seaworthy or using due diligence to make it so, is responsible for the negligence or incompetency of the master or any of the crew charged with a duty in that respect, and with the act of any agent in any port, charged with a like duty. This was held in

International Navigation Co. v. Farr & Bailey Mfg. Co., 181 U. S. 218, 225.

"We do not think that a shipowner exercises due diligence within the meaning of the Act by merely furnishing proper structure and equipment, for the diligence required is diligence to make the ship *in all respects* seaworthy, and that, in our judgment, means due diligence on the part of all the owners' servants in the use of the equipment before the commencement of the voyage and until it is actually commenced." (Italics in the Report.)

In 1 *Parsons, Shipping* (1869), 320, it is said that "a ship must be seaworthy or not seaworthy as a whole." (Quoted in *The Europa,* (1908) P. 84, 96.)

The due diligence required of a shipowner is almost endless in detail. Not only must the ship be made staunch and strong and seaworthy inside and out, but the statutes impose numerous duties upon the owner.

The statutes contain minute requirements as to the manning and equipment of our seagoing steam vessels. Some of them are as follows:

No vessel of the United States shall be navigated unless she have in her service and on board such complement of licensed officers and crew and certified lifeboat men as the local inspector considers necessary for her safe navigation. (37 Stat. 733.)

Every ocean going vessel of 1000 gross tons and over carrying passengers is required to have three licensed mates. (37 Stat. 733.)

Every steamship carrying passengers during the night time is required to keep a suitable number of watchmen in the cabins and on each deck (16 Stat. 442) and to be provided with such number of lifeboats, floats, rafts, life preservers, etc., as will best secure the safety of all persons on board in case of disaster. (16 Stat. 455; 25 Stat. 1012; 33 Stat. 1024; 38 Stat. 1170; 39 Stat. 224.)

The Inspection Service determines the character and extent of this equipment and certifies to it in the "Official Certificate of Inspection." *Ibid.*

All of these statutory injunctions must, of course, be strictly obeyed, otherwise the ship is unseaworthy.

Can it be argued that a failure to meet any one of these minute requirements would deprive the owner of the protection of Section 3 of the act when the failure had no possible relation to the disaster causing the cargo damage? Is that the intent of this remedial act? Under such an interpretation would not a shipowner be worse off than before the act was passed?

Some of the hardships, or rather the absurdities, to which the act might lead if no causal relation need be shown, easily suggest themselves.

Take this case put by an eminent admiralty lawyer: A ship is required to have a fog horn, else she is unseaworthy. She has a collision on a sunshiny day by fault in navigation, which under the act is an excepted risk. Her cargo is damaged. Is she deprived of the protection of the act?

In *The Turret Crown*, 282 Fed. 354, 359, Ward, *C. J.*, found that the ship was unseaworthy at sailing in respect of her steering gear, but that it was "bottom damage which injured the cargo," and that "the breaking down of the steering gear, instead of increasing, decreased the strain." That is, the defective steering gear (which made her unseaworthy at sailing) actually lessened the effect of the bottom damage which injured the cargo.

Consider the case of a ship which was seaworthy at sailing except as to her refrigerating apparatus, which was defective at sailing. Half of her cargo was fruit or meat, and half was goods not requiring refrigeration. She stranded by her fault in navigation and her cargo was damaged. It would be a narrow interpretation of the Harter Act which would place upon the shipowner a liability for the loss of the unrefrigerated cargo by the disaster.

Stress has been placed by opposing counsel upon the words in the act "in all respects," and from them they argue against the causal relation rule. But they do not support their argument. Indeed, they are in no way applicable to it. Their purpose is only to emphasize the quality or degree of seaworthiness. The act requires that the ship must be seaworthy "in all respects." Every minute requirement of seaworthiness must be provided for or she is unseaworthy. But whether or not to apply the rule of causal relation is an entirely different question. That question relates only to the effect of the absence of such seaworthiness when the ship has met one of the excepted risks as to which the unseaworthiness has no causal relation.

As we might say, the words "in all respects" apply only to the ship before sailing. The causal relation rule can arise only during the voyage.

An article in *16 Harv. Law Rev. 157, 167,* by Professor Frederick Green (1903) is instructive:

> "Suppose, however, that there has been neither seaworthiness nor diligence to make seaworthy, yet that damage results solely from fault in navigation. A steamship has a cracked shaft that will be dangerous in rough weather, but by negligence the crack is not discovered and she is permitted to sail without repair. No rough weather occurs. The steamer crosses the ocean in safety, but negligently comes into collision in the harbor of destination. Is the owner, who would not have been made liable for damage to his cargo by the negligent failure to examine the shaft before sailing, provided it had not been cracked, to be rendered liable by the mere fact that a crack in it existed, although its existence had not the slightest connection with the damage? The proviso is whimsical, if for such an irrelevant accident it excludes the owner from an exemption he would otherwise receive.
>
> "No case has been found in which the owner was so excluded. Although the passage last quoted from the opinion of the Supreme Court may seem at first sight to say that he should be excluded, it will appear

on examination that it does not say so.* It means that if the cause of the loss is a failure to use care to make seaworthy, the case is not within the exemption, even though such failure is a fault in management. It does not mean that exemption would be refused for a fault in management, because of a failure to use care to make seaworthy, distinct from the fault in management and not contributing to the loss.

"The sole effect of the proviso seems to be that which has just been suggested. When section three says that the owner shall not be liable for fault in navigation or management, provided diligence has been used to make seaworthy, it excludes from fault in management all carelessness in preparing the vessel for the voyage. Under this interpretation, the act is reasonable and consistent, and its language is such as might naturally be used to express its intent. The interpretation is a literal one as well. For the diligence to which the proviso refers, is diligence which it is the carrier's duty to employ. But so far as concerns liability for damage to cargo, his only duty is to avoid such damage, and, if no damage results from his lack of diligence, the carrier is at liberty to be as careless as he pleases. If his lack of diligence does not contribute to the damage, he has used all the diligence that was due, and the proviso is fulfilled. That this is true when the vessel is seaworthy, has already been seen, and it proves that the act is not intended to deprive the owner of exemption, merely because he is careless in equipping his ship. . . . *In short, it means, it is submitted, that the damage for which exemption is granted, must not be damage resulting from failure to employ that diligence in preparing the vessel for sea upon the exercise of which the act insists.* The proviso is inserted only to make it clear that the exoneration granted is in no way to derogate from the obligation to take due care for seaworthiness. It was necessary to insert it because fault in management might otherwise be supposed to include fault in equipping the vessel for sea. There are English cases in which even the phrase 'improper navigation' was held to include such fault."

* International Navigation Co. v. Farr & Bailey Mfg. Co., 181 U. S. 218, 226.

In a memorandum filed in this case as *amicus curiæ* in aid of the petition for writs of *certiorari,* Mr. Roscoe H. Hupper said

> "The decision of the Circuit Court of Appeals for the Third Circuit, now sought to be reviewed, deprives the shipowner of this benefit if the vessel was unseaworthy in any respect whatsoever, irrespective of this unseaworthiness having no relation to the damage.
>
> "Section 3 of the Harter Act ever since its enactment in 1893 has been generally understood to confer on the shipowner certain immunities to offset certain burdens imposed by Sections 1 and 2 as to the terms of the bills of lading. By the decision of the Circuit Court of Appeals, Section 3, instead of granting benefits, imposes a burden which did not exist before the statute was enacted. Granting all that can be said as to a public policy against unseaworthiness of vessels, it is believed that no support can be found for a doctrine which penalizes the shipowner if the unseaworthiness (however trivial) has nothing to do with the damage. Such a result seems unjust and not in accord with the purpose of the statute in view of the conditions with which it dealt."

From a like memorandum filed by Mr. John W. Griffin, we quote:

> "In substance, the Circuit Court of Appeals states that unless the carrier proves that due diligence has been exercised to make the vessel in all respects seaworthy, he loses the right to take advantage of the Harter Act, even though the failure to make the vessel seaworthy has nothing whatever to do with the loss.
>
> "While the Circuit Court of Appeals refers only to the first exception from liability above mentioned, the same principle must apply to all the other exemptions contained in the statute.
>
> "Therefore, under the decision of the Circuit Court of Appeals, if the shipowner failed to make his vessel seaworthy, he would be liable for losses due to the Act of God, the public enemy, the inherent vice of the thing carried, insufficiency of package, or seizure

under legal process, even though the vessel's lack of seaworthiness had no possible connection with the loss, and although the goods suffered no damage whatsoever from the vessel's lack of seaworthiness.

"This argument might be elaborated and other illustrations drawn, showing the almost unthinkable results which follow from the rule laid down by the Circuit Court of Appeals, as, for instance, where a ship is unfit as to a small part of her cargo, but entirely seaworthy as to the remainder. It is believed, however, that enough has been said to show that the interpretation of the Circuit Court of Appeals is a perversion of the statute.

"The purpose of the Harter Act was, as is well known, to relieve American shipowners from certain burdens to which they were otherwise subject.

"If the construction put upon the Act in the Third Circuit be the correct one, shipowners are now much worse off than they were prior to 1893."

The same argument was made when the causal relation rule came up in England under the then common law rule of implied warranty of seaworthiness, thus:

In *Kish v. Taylor,* (1912) A. C. 604, 615, Lord Atkinson said (p. 615):

"Mr. Atkin, on behalf of the respondents, was driven to admit that, if his contention on the first point were sound, it would be competent for every indorsee of a bill of lading, whose goods had, in fact, been carried safely and with due expedition to the appointed port of discharge, to contend that, by reason of some of those comparatively trifling omissions on the part of the master which have been held to render a vessel unseaworthy, such as sailing without two anchors, sailing without an adequate supply of medicines and medical appliances for the crew he was released from all obligations imposed upon him by the bill of lading, the argument being that the provision of a seaworthy ship was a condition precedent, and not having been performed the contract of affreightment was entirely displaced."

Lord Ellenborough said in *Havelock v. Geddes,* 10 East 555, 563:

> "And to be sure, if this [a covenant to make the ship tight and strong, etc.], were a condition precedent the neglect of putting in a single nail for a single moment after the ship ought to have been made tight, staunch, etc., would be a breach of the condition, and a defense to the whole of plaintiff's demand."

There is no middle ground of decision. It must be, we submit, either a rule of rigid requirement down to minute details of unseaworthiness, with all of its consequences, or else the causal relation rule.*

The Harter Act is concerned only with seaworthiness in which deviation plays no part. The sole effect of deviation is to displace the bill of lading. *The St. Johns,* 263 U. S. 119. If the "WILLDOMINO" was seaworthy when she sailed to North Sydney, the owner is protected under Section 3 of the Harter Act. It would make no difference whether she had the right to go to North Sydney or not. She did go there. That she was in fact seaworthy and had ample coal when she sailed on that stage cannot be disputed. She reached North Sydney with a surplus of coal.

We submit that the Circuit Court of Appeals erred in not applying the rule of causal relation and should be reversed.

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*The conclusion which opposing counsel are asking the Court to reach in refusing to interpret the Harter Act upon the rule of causal relation is so accurately expressed in *The Merchant of Venice,* Act IV, Scene 1, that it is here quoted:

> "*Portia.* Therefore prepare thee to cut off the flesh.
> Shed thou no blood, nor cut thou less nor more
> But just a pound of flesh: if thou cuttest more
> Or less than a just pound, be it but so much
> As makes it light or heavy in the substance
> Or the division of the twentieth part
> Of one poor scruple, nay, if the scale do turn
> But in the estimation of a hair,
> Thou diest and all thy goods are confiscate."

POINT IV.

The petitioner took reasonable care of the damaged merchandise after the stranding. The Circuit Court of Appeals erred in finding that it did not do so.

The District Court found that the petitioner took reasonable care of the merchandise after it was damaged (R. 1381, 1384). The Circuit Court of Appeals held that it failed to take such care in that it did not remove the merchandise from the damaged hold on August 25th when the vessel first entered drydock (R. 1436). In all other respects it agreed with the District Court that the petitioner exercised reasonable care (R. 1435-6) and this joint finding is fully supported by the evidence.

In reaching the conclusion that it was negligence for the petitioner not to discharge the merchandise on August 25th, the Circuit Court of Appeals overlooked the uncontradicted testimony that both parties and also the underwriters considered at that time that the merchandise was a total loss.

The citrate of lime when shipped was a dry powder, consisting of condensed lemon juice combined with chalk (lime) (R. 715). The chalk is merely a carrier for the citric acid (R. 708). This commodity is not generally known in commerce. Its use is for conversion into citric acid (R. 741). There were not more than a half-dozen consumers of the commodity in the United States in 1920 (R. 748). Cross-examination by respondents' counsel indicates that besides the two respondents herein, there was only one firm in the United States that imported it (R. 182).

The shippers of the citrate of lime gave the master and chief officer no notice of its properties or value (R. 354, 367). The vessel stranded on July 24th at 6.30 A. M. (R. 1063) and the citrate of lime was submerged within five or ten minutes thereafter (R. 354). The ship's officers be-

lieved that it was at once spoiled by this submersion (R. 376). The port warden and the surveyors at Halifax who surveyed the vessel and cargo at that port several days after the stranding believed that it was then damaged beyond saving (R. 516, 526, 599, 610).

The vessel arrived at New York on August 7th, commenced discharging on August 9th, completed discharging other cargo which was not damaged and was placed in drydock for a survey for repairs on August 25th, which was thirty-two days after the stranding. During this time the citrate of lime was completely under water with the exception of a part tier on top which apparently was entirely under water part of the time and only partly under water the rest of the time. The undamaged cargo was expeditiously discharged (R. 227, 247).

The vessel remained in drydock twenty-six hours beginning August 25th for survey by the contractors who were bidding for the repairs, and was then placed in wet dock (R. 81). On August 28th she was again placed in drydock for eight hours while the repair men prepared patterns for the required new parts (R. 82) and was then put into the water while these parts were being fabricated. She was again put in drydock on September 21st, where she remained until October 2d while the new parts were fixed in position (R. 82). The shipyards were very busy at the time and drydocks were in constant demand (R. 772). The repairs were expeditiously made (R. 132). The citrate of lime remained in the hold until the completion of repairs on October 2d when it was tendered to respondents and refused (R. 1324). Petitioner's proof showed that the merchandise could not be discharged while the ship was on drydock (R. 113, 122, 132, 210, 356, 378, 383, 402).

The properties of citrate of lime are not commonly known to any persons except dealers in the merchandise (R. 181, 714) and to expert chemists. The testimony of the experts shows that the commodity is practically insoluble in sea water (R. 708, 737); that upon mixture with sea water

there is considerable decomposition caused by bacterial action (R. 167-8, 728-730). The bacteria exist in water and air (R. 716, 734) and also in the impurities in the commodity itself (R. 715) and feed upon the oxygen in the water until the oxygen is exhausted when they die and the decomposition ceases (R. 168-9). This decomposition results in the loss of some of the citric acid content (R. 167-8).

Respondents' experts testified that in their opinion the exposure of the wet citrate of lime to the air when the vessel went into drydock, and its later reimmersion in water when she went off the drydock, twice repeated, caused the bacterial processes to begin anew with additional loss of citric acid content (R. 711, 739). This contention is based upon the premise that these processes had ended before the drydocking, because of the death of the bacteria caused by the exhaustion of the oxygen in the water. This can hardly be said to have been established in view of the fact that the damage to the hull of the vessel was sufficient to allow a continual change of the water in the hold (R. 761, 853).

Prof. Simmons, testified as an expert from actual experiments with citrate of lime and sea water, which he made in preparation for the trial, extending over a period of two months, that these bacterial processes ceased at the end of the third week, because of a protective coating of calcium carbonate which formed upon the citrate of lime and prevented further decomposition by the bacteria (R. 169). His tests showed that there was no loss of the citric acid content after the third day of immersion in sea water (R. 181). Removing the citrate of lime from the water and immersing it again did not accelerate the decomposition according to his tests (R. 172). His opinion was that the citrate of lime suffered its entire damage within a few days after the stranding, and did not suffer any additional damage until it was unloaded. He testified that during the process of unloading, and handling, the citrate would be more or less disturbed, and that that would break up the

protective coating of calcium carbonate, and allow air to get in and set up decomposition anew (R. 172). Mr. Stillwell's testimony was generally to the same effect (R. 155, 161).

Admitting for the purposes of the argument and not otherwise, that the contention of respondents' experts is correct, nevertheless we submit that the petitioner should not be held liable for any loss due therefrom, in the absence of either knowledge by or notice to it of the properties of the commodity. Petitioner did not have such knowledge (R. 114, 217). Very few persons did (R. 714). Prof. Simmons, a college professor of chemistry for many years and director of a large chemical laboratory, testified that "few chemists unless they handled it or experimented with it would have known of the way in which calcium citrate decomposes due to bacteriological action" (R. 181).

Respondents, on the other hand, must have had knowledge of these peculiar properties of citrate of lime. There appears to have been only one other concern that imported it from abroad (R. 182). Both respondents were New Jersey corporations, and their offices were within a short distance of the places in New Jersey where the ship discharged and was repaired. They had every opportunity to advise the petitioner of these properties of the merchandise and to notify it of what ought to be done in order to save any value that remained (R. 114, 217). They gave no such advice, and made no suggestions. Instead, they claimed that the shipment was a total loss and collected their insurance from their underwriters.

Respondents' attitude is similar to that of the underwriters in *The Strathdon,* 89 Fed. 374, 381, referred to by the trial court in its opinion (R. 1384). They preferred "to express no advice or wish concerning the disposition of the cargo but rather to leave the carrier in his embarrassment unaided by counsel and unconstrained by demand for any definite action."

Mr. Martin, the marine surveyor in charge of repairs to the ship, testified that all the surveyors assumed that the cargo had been under water so long "that no more damage could be done to it while the vessel was undergoing repairs" (R. 135, 132, 140).

The cargo underwriters and their surveyors were undoubtedly of the same opinion as Mr. Martin. The report of Mr. Rodman, the surveyor for the Insurance Company of North America (underwriter on the Citro Chemical Company shipment) shows that he had notice of the loss on August 2, 1920 (R. 904) which was before the vessel sailed from Halifax. He was on board the vessel in New York harbor on August 9th, 11th, 17th and 24th (R. 249, 250). On August 28th, when the vessel was in drydock, he took samples of the citrate which he submitted to Scherer Bros., chemists employed by the underwriters, for analysis (R. 251), who had an analysis made by Dr. Saarbuck (R. 758). He gave his certificate of analysis on September 2, 1920 (R. 911). Scherer Bros. on the same day submitted their certificate of analysis to Rodman (R. 903). Rodman testified that Scherer Bros. then stated to him that they considered the shipment worthless (R. 254). Rodman thereupon communicated with respondent, Citro Chemical Company. He testified that when he so communicated, the respondents were "inclined to consider the situation hopeless" (R. 253). The samples upon which this analysis was based were taken from the casks on August 28th when the vessel was in drydock and only three days after she first entered it (R. 251).

Mr. Liesegang, the surveyor for the Queen Insurance Company (underwriter on Pfizer shipment), was employed by the underwriters on August 10th and proceeded on board the vessel on the same day (R. 196, 886). He had previously been aboard as surveyor for the general average adjusters (R. 192). He knew on August 10th that the citrate was covered by water (R. 196, 886) and so advised respond-

ent Pfizer by telephone, apparently on the same day (R. 194).

The citrate was covered by cork and could not be examined until the cork was discharged. On August 23rd, after the cork had been discharged, Liesegang, with Haffey, respondent Pfizer's traffic manager, examined the top tier of citrate casks which tier was then partly out of water, opened one of them, and took a sample. Haffey told Liesegang at that time that *he considered the citrate of lime was a total loss,* but wished to take samples for analysis (R. 193, 681, 887). A day or two later, when the vessel was still at 135th Street (before she was first drydocked), Liesegang had further samples taken from other casks for analysis (R. 197). These samples were also sent to Scherer Bros., chemists, and were analyzed by Dr. Saarbuck (R. 759, 911). An analysis was also apparently made at the Pfizer factory, but was not produced at the trial although called for (R. 682).

On September 2nd respondent Pfizer wrote petitioner stating that "from samples taken from of about 40 casks out of this shipment *it appears that these goods will be a total loss* due to the fact that they have been in water for so long a period, and we hereby notify you that we reserve the right to file claim" (R. 682, 891). The samples referred to in this letter were evidently those above mentioned which were taken when the vessel was at 135th Street *before she entered the drydock* (R. 197).

Respondent Pfizer notified the underwriters that the goods were a total loss, abandoned the merchandise to them (R. 198) and collected its insurance (R. 682). On August 23rd or 24th it informed the customs authorities that the goods were a total loss, and asked for a refund of duties (R. 688).

The above testimony was taken orally before the trial court. Most of it was drawn from the lips of witnesses

hostile to the petitioner. It evidently impressed the trial judge for he dealt with it at length in his opinion (R. 1383), and found that as a result of the analysis of the samples taken prior to August 27th "it was stated that the shipments were total losses."

The law is undisputed. Petitioner was not an insurer of the damaged merchandise provided the damage occurred through an excepted cause. After the damage occurred, petitioner was only required to take reasonable care of it. *Propeller Niagara v. Cordes*, 21 How. 7; *McNeil Higgins v. Old Dominion S. S. Co.*, 235 Fed. 854; *S. S. Lynx v. King & Fisher*, 12 Mo. 272.

The finding of the Circuit Court of Appeals that the petitioner was negligent in caring for the damaged merchandise is not substantiated by the proof and is erroneous.

Finally

We submit that:

(1) The "WILLDOMINO" was seaworthy on every stage of her voyage.

(2) Her putting into North Sydney was not a deviation.

(3) Even if sailing to North Sydney was a deviation, that does not deprive the shipowner of the protection of Section 3 of the Harter Act which is only concerned with seaworthiness.

(4) In any case, inasmuch as no causal relation was shown between her unseaworthiness (if it existed) and the disaster which caused the damage to the respondents' goods, the ship and the shipowner are protected from liability by Section 3 of the Harter Act.

(5) Proper care was taken of the damaged cargo after stranding.

POINT V.

The decrees of the Circuit Court of Appeals should be reversed.

FRANCIS RAWLE,
GEORGE W. BETTS, JR.,
GEORGE C. SPRAGUE,
JOSEPH W. HENDERSON,
Counsel for Petitioners.

December 30, 1925.

APPENDIX.

The Harter Act (27 Stat. 445).

AN ACT relating to navigation of vessels, bills of lading, and to certain obligations, duties, and rights in connection with the carriage of property.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That it shall not be lawful for the manager, agent, master, or owner of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to insert in any bill of lading or shipping document any clause, covenant, or agreement whereby it, he, or they shall be relieved from liability for loss or damage arising from negligence, fault, or failure in proper loading, stowage, custody, care, or proper delivery of any and all lawful merchandise or property committed to its or their charge. Any and all words or clauses of such import inserted in bills of lading or shipping receipts shall be null and void and of no effect.

SEC. 2. That it shall not be lawful for any vessel transporting merchandise or property from or between ports of the United States of America and foreign ports, her owner, master, agent, or manager, to insert in any bill of lading or shipping document any covenant or agreement whereby the obligations of the owner or owners of said vessel to exercise due diligence, properly equip, man, provision, and outfit said vessel, and to make said vessel seaworthy and capable of performing her intended voyage, or whereby the obligations of the master, officers, agents, or servants to carefully handle and stow her cargo and to care for and properly deliver same, shall in any wise be lessened, weakened, or avoided.

Sec. 3. That if the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent, or charterers, shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel nor shall the vessel, her owner or owners, charterers, agent, or master be held liable for losses arising from dangers of the sea or other navigable waters, acts of God, or public enemies, or the inherent defect, quality, or vice of the thing carried, or from insufficiency of package, or seizure under legal process, or for loss resulting from any act or omission of the shipper or owner of the goods, his agent or representative, or from saving or attempting to save life or property at sea, or from any deviation in rendering such service.

Sec. 4. That it shall be the duty of the owner or owners, masters, or agent of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to issue to shippers of any lawful merchandise a bill of lading, or shipping document, stating, among other things, the marks necessary for identification, number of packages, or quantity, stating whether it be carrier's or shipper's weight, and apparent order or condition of such merchandise or property delivered to and received by the owner, master, or agent of the vessel for transportation, and such document shall be *prima facie* evidence of the receipt of the merchandise therein described.

Sec. 5. That for a violation of any of the provisions of this act the agent, owner or master of the vessel guilty of such violation, and who refuses to issue on demand the bill of lading herein provided for, shall be liable to a fine not exceeding two thousand dollars. The amount of the fine and costs for such violation shall be a lien upon the vessel,

whose agent, owner, or master is guilty of such violation, and such vessel may be libeled therefor in any district court of the United States, within whose jurisdiction the vessel may be found. One-half of such penalty shall go to the party injured by such violation and the remainder to the Government of the United States.

Sec. 6. That this act shall not be held to modify or repeal sections forty-two hundred and eighty-one, forty-two hundred and eighty-two, and forty-two hundred and eighty-three of the Revised Statutes of the United States, or any other statute defining the liability of vessels, their owners, or representatives.

Sec. 7. Sections one and four of this act shall not apply to the transportation of live animals.

Sec. 8. That this act shall take effect from and after the first day of July, eighteen hundred and ninety-three.

Approved, February 13, 1893.

Office Supreme Court, U. S.
FILED
OCT 6 1924
WM. R. STANSBURY
CLERK

Supreme Court of the United States.

STEAMSHIP WILLDOMINO, her engines, boilers, etc.,
Petitioner (Respondent Below),
against
CITRO CHEMICAL COMPANY OF AMERICA,
Respondent (Libelant Below).

STEAMSHIP WILLDOMINO, her engines, boilers, etc.,
Petitioner (Respondent Below),
against
CHARLES PFIZER & COMPANY, INC.,
Respondent (Libelant Below).

CONVOY STEAMSHIP COMPANY, LTD., owner of the Steamship WILLDOMINO, her engines, boilers, etc.,
Petitioner (Libelant Below),
against
CHARLES PFIZER COMPANY, INC.,
Respondent (Respondent Below).

October Term, 1925
Nos. [redacted] 165
166 167

BRIEF SUBMITTED ON BEHALF OF CONVOY STEAMSHIP COMPANY, LTD., BY JOHN W. GRIFFIN, AMICUS CURIAE.

The purpose of the argument which follows is to point out to this Court the exceeding import-

ance and probable error of that part of the opinion of the Circuit Court of Appeals which is quoted at the bottom of p. 11 and top of p. 12 of the petition.

In substance, the Circuit Court of Appeals states that unless the carrier proves that due diligence has been exercised to make the vessel in all respects seaworthy, he looses the right to take advantage of the Harter Act, even though the failure to make the vessel seaworthy has nothing whatever to do with the loss.

The third section of the Harter Act, to which the court below was directing its remarks, provides (omitting unnecessary verbiage) that if the shipowner shall exercise due diligence to make his vessel seaworthy, he shall not be held responsible for damage or loss resulting:

(1) From faults or errors in navigation or management.

(2) From dangers of the sea or other navigable waters;

(3) From acts of God or public enemies;

(4) From the inherent defect, quality or vice of the thing carried;

(5) From insufficiency of package;

(6) From seizure under legal process, and so forth.

While the Circuit Court of Appeals refers only to the first exception from liability above mentioned, the same principle must apply to all of the other exemptions contained in the statute.

Therefore, under the decision of the Circuit Court of Appeals, if the shipowner failed to make his vessel seaworthy, he would be liable for losses due to the act of God, the public enemy, the inherent vice of the thing carried, insufficiency of

package, or seizure under legal process, even though the vessel's lack of seaworthiness had no possible connection with the loss, and although the goods suffered no damage whatsoever from the vessel's lack of seaworthiness.

This argument might be elaborated and other illustrations drawn, showing the almost unthinkable results which follow from the rule laid down by the Circuit Court of Appeals,—as for instance, where a ship is unfit as to a small part of her cargo, but entirely seaworthy as to the remainder. It is believed, however, that enough has been said to show that the interpretation of the Circuit Court of Appeals is a perversion of the statute.

The purpose of the Harter Act was, as is well known, to relieve American shipowners from certain burdens to which they were otherwise subject.

> *The Irrawaddy*, 171 U. S. 187, 193;
> *The Jason*, 225 U. S. 32.

If the construction put upon the Act in the Third Circuit be the correct one, shipowners are now much worse off than they were prior to 1893.

As is pointed out in the petition and brief, a different conclusion has been reached in the Second Circuit.

It is respectfully submitted that the petition for writs of certiorari should be granted.

JOHN W. GRIFFIN,
Amicus Curiæ.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1924 1925

Office Supreme Court, U. S.
FILED
OCT 6 1924
WM. R. STANSBURY
CLERK

Steamship WILLDOMINO, her engines, boilers, etc.
Petitioner (Respondent Below)

AGAINST

CITRO CHEMICAL COMPANY OF AMERICA
Respondent (Libellant Below)

Steamship WILLDOMINO, her engines, boilers, etc.
Petitioner (Respondent Below)

AGAINST

CHARLES PFIZER & COMPANY, INC.
Respondent (Libellant Below)

CONVOY STEAMSHIP COMPANY, LTD., owner of the Steamship WILLDOMINO, her engines, boilers, etc.
Petitioner (Libellant Below)

AGAINST

CHARLES PFIZER COMPANY, INC.
Respondent (Respondent Below)

Nos. [illegible] 165 166 167

PETITION FOR LEAVE TO FILE MEMORANDUM

The undersigned respectfully petitions this Court for leave to file the following memorandum as *amicus curiæ* in support of the petition of Convoy Steamship Company, Ltd., for a writ of certiorari.

It is of the utmost importance to all shipping interests, including shippers and marine underwriters as well as shipowners, to have the authoritative decision of this Court on the question raised on Section 3 of the Harter

Act as to the necessity of a causal connection between unseaworthiness and damage. Undoubtedly a large proportion of ships putting to sea are not seaworthy in every respect in the strictest sense, but such unseaworthiness has no causal relation to the damage claims arising out of the voyage.

The decisions of the Circuit Court of Appeals for the Second Circuit cited by the petitioner hold the shipowner entitled to the benefit of Section 3 unless the unseaworthiness existing caused the damage. The decision of the Circuit Court of Appeals for the Third Circuit, now sought to be reviewed, deprives the shipowner of this benefit if the vessel was unseaworthy in any respect whatsoever, irrespective of this unseaworthiness having no relation to the damage.

Section 3 of the Harter Act ever since its enactment in 1893 has been generally understood to confer on the shipowner certain immunities to offset certain burdens imposed by Sections 1 and 2 as to the terms of the bills of lading. By the decision of the Circuit Court of Appeals, Section 3, instead of granting benefits, imposes a burden which did not exist before the statute was enacted. Granting all that can be said as to a public policy against unseaworthiness of vessels, it is believed that no support can be found for a doctrine which penalizes the shipowner if the unseaworthiness (however trivial) has nothing to do with the damage. Such a result seems unjust and not in accord with the purpose of the statute in view of the conditions with which it dealt.

It is respectfully submitted that the case is of sufficient public importance to justify the granting of a writ of certiorari.

ROSCOE H. HUPPER
As *Amicus Curiæ*.

27 William Street,
New York City.

October 4, 1924.

Nos. 165

166 167 IN THE

Supreme Court of the [illegible]

OCTOBER TERM, [illegible]

Steamship "WILLDOMINO," her engines, boilers, etc.,
Petitioner (Respondent Below),

—against—

CITRO CHEMICAL COMPANY OF AMERICA,
Respondent (Libellant Below).

Steamship "WILLDOMINO," her engines, boilers, etc.,
Petitioner (Respondent Below),

—against—

CHARLES PFIZER & COMPANY, INC.,
Respondent (Libellant Below).

CONVOY STEAMSHIP COMPANY, LTD., owner of the Steamship "WILLDOMINO," her engines, boilers, etc.,
Petitioner (Libellant Below),

—against—

CHARLES PFIZER & COMPANY, INC.,
Respondent (Respondent Below).

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

BISHAM, SINGLAR & JONES,
McDERMOTT, ENRIGHT & CARPENTER,
Proctors for Respondents.

D. Roger Englar,
James D. Carpenter, Jr.,
Of Counsel.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1924—NOS. 631, 632, 633.

Steamship "WILLDOMINO," her engines, boilers, etc.,
Petitioner (Respondent Below),

—against—

CITRO CHEMICAL COMPANY OF AMERICA,
Respondent (Libellant Below).

Steamship "WILLDOMINO," her engines, boilers, etc.,
Petitioner (Respondent Below),

—against—

CHARLES PFIZER & COMPANY, INC.,
Respondent (Libellant Below).

CONVOY STEAMSHIP COMPANY, LTD., owner of the Steamship "WILLDOMINO," her engines, boilers, etc.,
Petitioner (Libellant Below),

—against—

CHARLES PFIZER & COMPANY, INC.,
Respondent (Respondent Below).

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Basis of the Decision Below.

The opinion of the Circuit Court of Appeals shows that the decision is based on two grounds, either of which is clearly sufficient to sustain the decree.

1. The Court found as a fact that the owner of the *Willdomino* deliberately planned that the ship should go to North Sydney for the purpose of obtaining bunker coal, not merely to complete the voyage to New York, but also to furnish the *Willdomino,* or one of its other vessels, with bunker coal for the next eastbound voyage, because coal was cheaper at North Sydney than in New York and, also, because there were no difficulties and delays in obtaining coal at North Sydney such as existed, at that time, at New York.

It is, of course, well settled that a departure from the voyage for a purpose unconnected with the voyage itself, such as getting bunkers for a subsequent voyage, is a deviation which deprives the vessel of all provisions for its benefit in the bills of lading and makes it an insurer of the goods. (See the cases collected in Point Two of this brief.) Unless this Court reverses the finding of fact as to the purpose of the owner in having the vessel call at North Sydney, the decision below is clearly sustainable on this ground.

2. The Court also found that the vessel sailed on her voyage with insufficient coal and that such sailing was due directly to the instructions sent by the owner to the master at Gibraltar. This clearly amounted to unseaworthiness with the knowledge and privity of the owner. The Court further found that the stranding and damage to cargo was due to negligent navigation by the master, in that he failed to take soundings while skirting the dangerous coast between North Sydney and Halifax. The Court thereupon held the owner liable for the negligent navigation and fur-

ther held that he was not entitled to claim the benefit of the Harter Act because he had not used due diligence to make the vessel seaworthy. This decision is in accordance with numerous decisions of this Court, all of which are referred to in Point One of this brief, and is not in conflict with any decision of any other Circuit Court of Appeals. The only case that the petitioner cites in the petition as being in conflict with the decision below on this point is a decision of the Circuit Court of Appeals for the Fourth Circuit (Petition, p. 13):

> *The Turret Crown*, 284 Fed. 439, at page 444.

This case does not even discuss the Harter Act, for the reason that there was no finding of negligent navigation and, therefore, the question here involved did not arise. This case is also more fully discussed below in Point One of this brief.

Facts About the Shortage of Fuel.

The outstanding feature of the present case is the extraordinary cable which the owners of the *Willdomino* sent to her master at Gibraltar, reading as follows:

> "Your coal requirements excessive cost of bunkers Gibraltar very high make accurate measurement remaining bunkers if not enough to make North Sydney take only enough to reach there cut down consumption in every way if fuel runs short reaching coast cut out one boiler" (Petition, p. 6).

This cable was an express command to the master

to sail with his vessel unseaworthy. The witnesses on both sides agreed that good practice requires a vessel to sail with from 20 to 25% more fuel than she is expected to use, under normal conditions (Gurge, fol. 2532; Jeffcott, fols. 2392 to 2396; Williams, fol. 2595; Donaldson, fol. 1433). The cable above quoted clearly directed the master to violate this rule. It instructs him to take only enough fuel to make North Sydney, and refers to the possibility that fuel may run short approaching the coast. This is exactly what happened, and it was owing to this shortage of fuel that the vessel had to put into North Sydney and then skirt a dangerous coast, with which her navigators were wholly unfamiliar, in proceeding from there to Halifax (Petition, pp. 7 and 8). These facts are to be borne in mind in connection with the petitioner's assertion that there was no causal connection between the unseaworthiness and the stranding of the *Willdomino*.

It is true that the breakdown of the high pressure turbine intervened between the coaling at Gibraltar and the sailing from Ponta Delgada; but this did not break the causal relation between the owners' cable and the lack of sufficient fuel on leaving Ponta Delgada, for it appears that the cable received at Gibraltar was still in force at Ponta Delgada. The master testified as follows:

> "Q. When you left Ponta Delgada did you have the port of Sydney in mind at all as a place that you might go to? A. Yes. Q. Why? A. *My owners had instructed*

me at Gibraltar to bunker at North Sydney if I found it necessary" (Beeby, fol. 1083).

Moreover, the officers of the *Willdomino* testified, and the petitioner contended in both of the lower courts, that the *Willdomino,* when she left Ponta Delgada, actually sailed for New York and only put into North Sydney by reason of a shortage of fuel which developed in midocean. The District Court actually adopted this view, and the petitioner urged it strenuously in the Circuit Court of Appeals, but without success. As pointed out by the Circuit Court of Appeals, it is readily demonstrable from the petitioner's own evidence, that the supply of coal with which the *Willdomino* left Ponta Delgada was wholly insufficient for a voyage to New York. Nevertheless, the officers testified positively that the vessel sailed for New York, and in view of this fact, and the cable quoted above, the Circuit Court of Appeals reached the conclusion that the owners deliberately planned to have the vessel put into North Sydney under the guise of a vessel seeking a port of distress. We believe that no other conclusion is possible on the evidence, and if it be accepted that the vessel did sail for New York, her unseaworthiness is even more obvious, inasmuch as she not only had no margin of safety but actually had not fuel enough to bring her within several hundred miles of New York.

Owing to the strike at North Sydney, no considerable amount of fuel was obtainable there, and her owners ordered her to Halifax. This order was sent by wireless at a time when the vessel was still a day out from North Sydney. If she had not been short of fuel she could have

proceeded direct to Halifax, and would have had no occasion to skirt the dangerous Nova Scotian coast. Her fuel supply was so nearly exhausted, however, that she had to put into North Sydney and there procure enough fuel to take her to Halifax. It was this circumstance, coupled with the captain's ignorance of the coast and his gross negligence in failing to take soundings while proceeding along the shore in a dense fog, which led to the disaster.

The opinion of the Circuit Court of Appeals contains an exceptionally full and accurate discussion of the facts, as well as a clear statement of the legal principles involved. We believe that this opinion is the best answer which can be made to the petition, and the purpose of this brief is merely to supplement the opinion of the Circuit Court of Appeals in those particulars in which it is attacked by the petitioner.

POINT I.

The Circuit Court of Appeals was correct in its construction of Section 3 of the Harter Act.

The principles of law applicable to the facts of this case are clear and well-settled. A shipowner cannot exempt himself from liability for a negligent stranding, excepting by compliance with the terms of the Harter Act. This principle has frequently been stated by this Court. Thus, in the case of *The Jason,* 225 U. S. 32, this Court said, at page 49:

> "Prior to the Harter Act it was established that a common carrier by sea could

> not by any agreement in the bill of lading exempt himself from responding to the owner of cargo for damages arising from the negligence of the master or crew of the vessel. *Liverpool & G. W. Steam Co.* v. *Phenix Ins. Co.*, 129 U. S. 397, 438; following *New York Central Railroad Co.* v. *Lockwood*, 17 Wall. 357."

Accordingly, unless the shipowner can show affirmatively that he has used due diligence, as required by the Harter Act, he can have no exemption, either contractual or statutory, in respect of losses due to negligent navigation.

The Harter Act (Act of February 13, 1893), provides as follows (Section 3):

> "That, if the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped and supplied, neither the vessel, her owner or owners, agent or charterers, shall become or be held responsible for damages or loss resulting from faults or errors in navigation or in the management of said vessel," etc.

In the case of *International Navigation Company* v. *Farr & Bailey Mfg. Co.*, 181 U. S. 218, this Court said, at page 225:

> "We do not think that a shipowner exercises due diligence within the meaning of the act by merely furnishing proper structure and equipment, for the diligence required is diligence to make the ship *in all respects* seaworthy, and that, in our judgment, means due diligence on the part of all the owners' servants in the use of the equipment before the commencement of the voyage and until it is actually commenced."

We call the Court's attention particularly to the fact that the italics in the foregoing quotation are not our own, but appear in the original opinion.

See also:

The Southwark, 191 U. S. 1, at p. 16.

In the later case of *The Wilderoft*, 201 U. S. 378, at pages 388, 389, this Court said:

> "To permit a cargo of sugar to be injured by the introduction of fresh water in the manner shown, but for the provisions of this act, would have made a case of clear liability against the owner, and where the statute has given immunity against such loss by reason of error in navigation or management, it does so upon the distinct condition that the owner shall show that the vessel was *in all respects* seaworthy and properly manned, equipped and supplied for the voyage; or, if this cannot be established, that he has used due diligence to obtain this end. The discharge of this duty is not left to any presumption in the absence of proof. It is the condition precedent, compliance with which is required of the vessel owner in order to give him the benefit of the immunity afforded by the act. * * * It is only when he has discharged the burden which the law imposes upon him, and shown that he has furnished a vessel, fit and seaworthy, or has used due diligence to that end, that the law relieves him of the liability which he would otherwise incur." (Italics ours.)

The foregoing authorities show clearly that there need be no causal connection between the lack of due diligence and the subsequent negli-

gence. An even clearer statement to that effect is contained in a later portion of the opinion in the case of *International Navigation Company* v. *Farr & Bailey Manufacturing Company, supra,* where this Court said (at p. 226):

> *"We repeat that even if the loss occur through fault or error in management, the exemption cannot be availed of unless the vessel was seaworthy when she sailed, or due diligence to make her so had been exercised, and it is for the owner to establish the existence of one or the other of these conditions."* (Italics ours.)

It was suggested in the Court below that this language was mere dictum, but we submit that this is not the case. One of the points made on behalf of the carrier in the *Farr & Bailey* case was that the loss was due to negligence of the crew; so that the foregoing language was an essential part of the decision. But even if the language quoted were dictum, it has stood unchallenged as a correct statement of the law for nearly twenty-five years. Moreover, in *The Wildcroft, supra,* this Court, although affirming the decision of the Circuit Court of Appeals, deemed it necessary to correct the erroneous interpretation of the Harter Act embodied in the opinion of the lower Court (201 U. S. at p. 388). We submit that a statement of the law made under such circumstances is not to be lightly disregarded.

There is no decision either of this Court or of any of the lower courts which is contrary to the rule laid down in the above quotations.

The petitioner refers repeatedly to the case of

the *Turret Crown*. (275 Fed. 961; reversed 297 Fed. 766, reargument denied January 15, 1924, petition for certiorari denied 264 U. S. 591. Same case, 284 Fed. 439.) In that case the vessel was unseaworthy in respect both of her steering gear and her bottom tanks. Judge Ward, in the District Court, held that the owners used due diligence as to the bottom tanks, but not as to the steering gear. As the bottom tanks leaked in heavy (although not extraordinary) weather, and as Judge Ward found that the defective steering gear did not contribute to the bottom damage, he held that the owners were not liable.

It was this part of Judge Ward's opinion which the Circuit Court of Appeals for the Fourth Circuit was "disposed" to accept (Petitioner's Brief, pp. 28, 29).

This decision, however, was reversed by the Circuit Court of Appeals for the Second Circuit because it found that the unseaworthy condition of the steering gear contributed to the leakage of the fuel tanks.

Assuming the facts to be as found by Judge Ward, his decision was correct, because the bottom damage did not result from any negligence of the crew, but from a latent defect not discoverable by due diligence. Failure to use due diligence to make the ship seaworthy does not render the carrier an insurer, but merely deprives him of any benefit under the third section of the Harter Act. If damage results from latent defects (not discoverable by due diligence) and/or from heavy weather, the carrier does not need to rely upon the Harter Act; but if, as in this case,

damage results from negligence in navigation, the carrier's only protection is the third section of the Harter Act, and this he cannot avail himself of unless he has used due diligence.

Put in another way, the situation is that a carrier, even at common law, could validly exempt himself from liability for latent defects not discoverable by due diligence; but he could not validly exempt himself from liability for negligence of his servants. It was only after the Harter Act that the shipowner could obtain any exemption in respect of his servants' negligence; and this exemption is strictly conditioned on his having used due diligence to make the ship seaworthy.

Petitioner's only excuse for citing the *Turret Crown* in this connection is a parenthetical remark by Judge Ward, quoted on page 27 of the petitioner's brief. It consists of the following sentence, which is the only reference in Judge Ward's opinion to the point under discussion:

> "If forcing the steamer into the sea, whether a head sea or a following sea, at a speed sufficient to give steerageway, did contribute to the bottom damage, it was an error in navigation and management of the vessel, for which the claimant is excused by the Harter Act" (p. 360).

The point covered by this sentence was not arguged before Judge Ward and it is clear from his language that this point was not an essential part of his decision. Certainly, in view of the fact that the case was reversed by the Circuit Court of Appeals, Judge Ward's incidental refer-

ence to the Harter Act cannot stand as an authority.

The case of the *R. P. Fitzgerald,* to which the petitioner refers, has no bearing whatever on the present case. The vessel was held liable and the part of a sentence which the petitioner quotes from the opinion is not entitled to rank even as a dictum.

Cases arising under the Act of 1851 (U. S. Comp. Stat. 8021, Rev. Stat. 4283) can have no possible bearing on the interpretation of the Harter Act. The Act of 1851 provides as follows:

> "Sec. 4283. (*Liability of owner not to exceed his interest.*) The liability of the owner of any vessel, for any embezzlement, loss, or destruction, by any person, of any property, goods or merchandise, shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred without the privity, or knowledge of such owner or owners, shall in no case exceed the amount or value of the interest of such owner in such vessel and her freight then pending."

It is clear from the language of this statute that the shipowner only loses his right of limitation by reason of his privity with the particular damage or loss claimed. The fact that he is privy to some defect or unseaworthiness having no bearing on the loss or damage is immaterial. The Harter Act, however, is framed on an entirely different theory. As this Court has repeatedly

and clearly pointed out, the exemption which it grants is strictly conditioned on the use of due diligence to make the vessel seaworthy.

The very structure of the third section of the Harter Act clearly indicates that there is no causal connection contemplated between the condition and the exemption. There will rarely be any connection between unseaworthiness and negligence in navigation; and yet due diligence to make the ship seaworthy is made the condition of exemption in respect of negligent navigation.

In closing under this head, we wish to refer again to the facts mentioned at the beginning of this brief, which clearly establish that there was in fact a causal relation between the unseaworthiness of the *Willdomino* and the stranding which caused the damage to libellants' cargo. Even the petitioner does not suggest that the unseaworthiness must be the proximate cause of the loss. Such a suggestion would involve a too flagrant disregard of the Harter Act. The petitioner's argument is that there must be a causal connection, and such a connection is clearly established in this case. The facts of the present case are that a shipowner deliberately sends his vessel to sea with insufficient fuel and, in consequence, it becomes necessary for her to skirt a dangerous and unfamiliar coast while proceeding from one port to another in search of fuel; while so proceeding, the vessel strands through the negligence of her navigators. To permit the shipowner to have the benefit of the third section of the Harter Act under such circumstances would be to ignore the plain language and the clear intent of that section.

POINT II.

The evidence fully sustained the finding of the Circuit Court of Appeals that the *Willdomino* committed an unjustifiable deviation by putting into North Sydney.

The decision of the Circuit Court of Appeals that the *Willdomino* was guilty of an unjustifiable deviation was based in part upon a finding that the owner's purpose in sending her there was to obtain bunkers for a subsequent voyage. This finding was fully justified by the evidence.

The claimant's own testimony shows that one of the principal reasons, if not the controlling reason, for having the vessel coal at North Sydney, was that there was difficulty, at this time, in obtaining bunkers for foreign vessels in American ports. The witness Williams, President of the petitioner, refers to this point repeatedly. He testified as follows:

> "Q. But did you give your master standing orders to coal at Sydney? A. I don't know as he had standing orders. We have made it a sort of practice to coal at North Sydney; as I recall it, along about that period we were having great difficulty in getting ship's bunkers on the Atlantic Coast of the United States, as you know in those days there were many embargoes on coal, and so on" (fols. 213-4).

He repeated this same statement in varying forms at least half a dozen times (See, for ex-

ample, fols. 221, 222, 705, 2562-3, 2573, 2576-7). Indeed, this point was so thoroughly impressed on everybody at the trial that the learned District Judge embodied it in his opinion, as follows:

> "The *Wildomino* was a British ship and at the time in question there were restrictions upon the supplying of bunkers to foreign ships on the Atlantic coast of the United States. The claimant had been obtaining its bunkers at Sydney and Halifax" (fol. 4136).

Curiously enough, both the claimant and the learned District Judge appeared to have overlooked the fact that the difficulty of obtaining bunkers in American ports had nothing to do with the westward voyage. Any embargo or coal shortage in the United States would be material only in connection with the vessel's next outward voyage, with which these libellants had no concern. The importance of this point appears to have dawned upon the claimant in the later stages of the trial. Early in the trial the witness Williams, President of the claimant company, testified as follows:

> "Q. Did you anticipate that when the vessel sailed from Ponta Delgada that she would go to Sydney and there take on approximately 1,400 tons of coal? A. No. We may have given him orders to proceed to the nearest coal port, which would have been North Sydney from Ponta Delgada.
>
> Q. If he could have gotten it there, was it the duty of the master when he got to Sydney to fill up his bunkers with coal there?
>
> Mr. Sprague: I object to that ques-

tion as to what the duty of the master was.

The Court: I will permit it.

A. *It might be considered his duty, but since we were able to get in touch with North Sydney we would have given the instructions*" (fols. 702-3).

Near the end of the trial he evidently realized the danger of even this very guarded admission, for he qualified this testimony as far as it was possible for him to do, in view of what he had already said. His later testimony was as follows:

"Q. When you sent this cable to your master directing him to go to Sydney, didn't you intend that he should at North Sydney take on bunkers for the return trip to Europe? A. No, sir. *We hadn't any voyage fixed.*

Q. Well, for the next trip that this vessel should make to sea? A. No, sir.

Q. You didn't intend that he should take on enough coal to go to sea again? A. *No, sir, hadn't any next voyage in mind.*

Q. Did you intend that he should take on enough coal at North Sydney to coal some other ship of yours from an Atlantic port to sail? A. No, sir.

Q. Now, that is exactly what the *Willdomino* had done on the preceding trip, wasn't it? A. *After we arrived at North Sydney, we did that, yes*" (fols. 2584-5).

We have italicized the portions of the witness Williams' testimony which seem to us to show clearly his purpose to evade the issue and take refuge in that fact that no orders had actually been given to the *Willdomino* to fill her bunkers at North Sydney, and that the vessel's next voyage

had not yet been actually fixed. We submit that it is perfectly plain from his testimony that the whole purpose of sending the vessel in to North Sydney was to procure bunkers for her next voyage from the United States, and that instructions to this effect, although they had not yet been actually given, would certainly have been given when the vessel reached North Sydney, if it had not been for the labor troubles which existed there. These troubles made it necessary to divert the vessel to Halifax, where the bunkers would undoubtedly have been filled, but for the stranding. If this were not so, all of Williams' testimony about the difficulty of obtaining bunkers in American ports would be meaningless.

Once it is established that the purpose of going to North Sydney was to procure bunkers for the next voyage, the voyage to that port becomes an unjustified deviation.

In the first place, it is settled that even the wide liberties granted by the printed clauses in claimant's bill of lading will be construed as applying only to matters connected with the voyage for which the bill of lading is issued. In *Austrian, etc., Co.* v. *Calafiore,* 194 Fed. Rep. 377, a steamer which had the same wide liberties which the *Willdomino* would have had, if her printed bills of lading had not been modified by the written clause, was proceeding from Mediterranean ports to New Orleans. She stopped at Tampa to take on some cargo which was to be carried back to the Mediterranean on her return voyage. The Circuit Court of Appeals for the 5th Circuit said that, notwithstanding the wide

liberties granted by the bill of lading, the ship was guilty of an unjustified deviation because the stop at Tampa had nothing to do with the westward voyage. In the course of its opinion, the Court said (at p. 378):

> "The reservation in the bill of lading on which the claimant relies to relieve itself from liability for delay and detention at Tampa must be construed with reference to the voyage in contemplation of the shipowner and the shippers at the time the bill of lading was issued, and therefore be restricted in allowing deviation to the business and necessities of the ship pertaining to that voyage. *See Swift* v. *Furness, Withy & Co.*, 87 Fed. 345; *Liverpool Steamship Co.* v. *Phoenix Ins. Co.*, 129 U. S. 441, 9 Sup. Ct. 469, 32 L. Ed. 788; *Pacific Coast Co.* v. *Yukon Independent Transport Co.*, 155 Fed. 35, 83 C. C. A. 625; *Leduc* v. *Wood*, 20 Q. B. D. 482; *Glynn* v. *Margretson* (Appeal Cases), L. R. 1893, p. 355."

This principle is precisely applicable to the present case.

The decision in the present case, however, is not dependent on the general principle laid down in the *Calafiore* case, and in the cases there cited. Although the bill of lading in the present case contained a printed clause giving very wide liberties of deviation, these liberties were restricted by a clause added in handwriting, which read as follows:

> "Filling up only in ports on the way westward of (sic) New York" (Petition, p. 6).

It is undisputed, and the District Court found,

that the word "of," in this clause, should read "to." (See remarks of claimant's counsel, fol. 2476; testimony of Gurge, fols. 2520-1; Opinion, fol. 4133.)

Reading this clause in connection with the printed clause "the ship has liberty of filling up and/or bunkering at any port or ports in or out of the way" (Petition, p. 6), it is clear that although the ship retained wide liberties in respect of bunkering, she surrendered, by special stipulation, the privilege of taking on additional cargo at ports which were not along the direct route to New York. Clearly, coal which is not intended to be used on the pending voyage cannot properly be referred to as "bunkers"; so far as the pending voyage is concerned, such coal is a part of the cargo. Accordingly, in taking on coal for her next voyage, the *Willdomino* would not have been bunkering, but would have been "filling up" within the meaning of the written clause of the bills of lading. This involved a clear violation of the terms of the bills of lading and constituted a wholly unjustifiable deviation from the voyage contracted for.

The distinction between a deviation and a mere intention to deviate clearly has no bearing on the present case. The deviation in this case was fully consummated when the *Willdomino* put into Sydney. No case has ever suggested that the purpose for which a vessel puts into a port is not to be considered in determining whether her calling at such port is a deviation. Calling at a port for an improper purpose is a deviation, and the deviation is consummated the moment the vessel changes her course for the purpose of

proceeding to such port, irrespective of whether or not the improper purpose is ever in fact carried out. The decision of the Circuit Court of Appeals on this point is clearly correct.

The closing argument for the petitioner under this head is scarcely worthy of a reply. It is, in substance, that a shipowner can evade the law with respect to deviation by doing what the Circuit Court of Appeals has found that this petitioner did, *i. e.*, by deliberately sending his vessel to sea with insufficient fuel so that she will have to put into a port to which she would not otherwise be justified in proceeding. The case of *Kish* v. *Taylor* is not authority for any such doctrine. In that case the cargo was not damaged; and there was no suggestion that the owners designedly sent the vessel to sea in an unseaworthy condition. Furthermore, the effect of *Kish* v. *Taylor* has been very greatly limited by the decision of the House of Lords in the later case of *Atlantic Shipping & Trading Co.* v. *Dreyfus,* L. R. (1922), 2 A. C. 250.

The Court will, of course, bear in mind that an unjustifiable deviation renders the interpretation of the Harter Act immaterial; for even if a vessel is seaworthy, her owner becomes liable, as at common law, for damage to cargo, if the vessel deviates from the voyage contracted for without lawful excuse, *The St. Johns,* 263 U. S. 103; *The Sarnia,* 278 Fed. Rep. 459; *Niles-Bement-Pond Co.* v. *Dampkiesaktieselskabet Balto,* 282 Fed. Rep. 235.

POINT III.

The finding of the Circuit Court of Appeals that libellants' cargo was not delivered in specie is fully supported by the evidence.

The third point of petitioner's brief relates entirely to a question of fact. The Circuit Court of Appeals said of libellants' cargo:

> "We think the record establishes conclusively that it was no longer in specie."

There was ample evidence to sustain this finding (Haffey, pp. 677 to 679; Liesegang, p. 198; Martin, p. 134; Rodman, p. 255).

POINT IV.

It is respectfully submitted that the writ of certiorari should be denied.

September 30, 1924.

Respectfully submitted,

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